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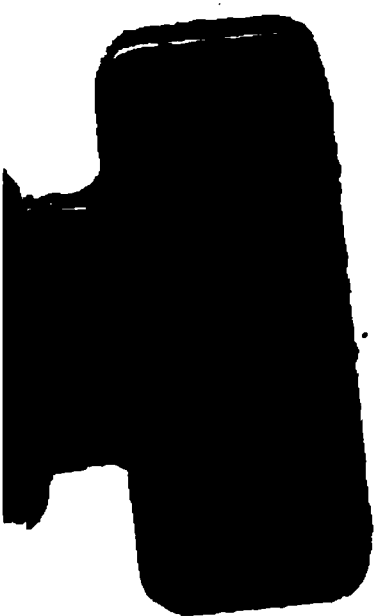
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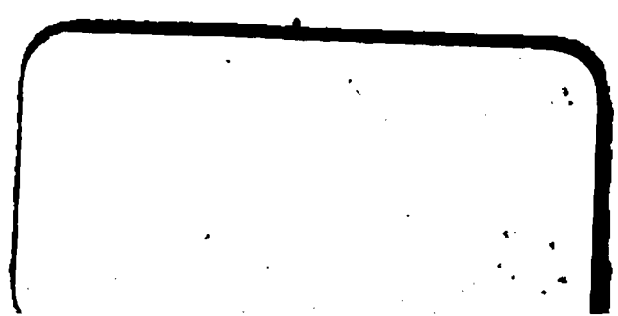


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THE

JOURNAL OF JURISPRUDENCE.

WAS THE SEIZURE OF THE SOUTHERN COMMISSIONERS LEGAL?

WE do not deem any apology necessary for discussing in a legal journal this all-important question. The press, it is true, has already, with the ability and vigour which distinguish British journalists, completed an investigation; and the writers have turned aside to new inquiries, as if everything had been said about the capture which was worth saying on the subject. We cannot, however, believe that legal readers are yet satisfied with the discussions which have taken place. The issue of war betwixt Great Britain and America is so momentous, to depend upon the rightful solution of a problem of international law, that they who are most familiar with the subjects of inquiry will be the last to form hasty conclusions. Nothing can more strikingly show the importance and dignity of the legal profession in a civilised State, than the course adopted by the Government, and sanctioned by the people, on receipt of the news of the boarding of the 'Trent.' The first step adopted was to ask eminent lawyers their opinion of the legality of the act, and according to the leaning of that opinion the action of the Government was shaped for better or for worse. The consulted lawyers knew that peace or war, in all probability, depended on the result of their deliberations; and so knowing, they doubtless applied themselves to the task, under a most solemn sense of responsibility. We do not know what their opinion was, further than that they regarded the manner of making the seizure to be contrary to international precedent. We are ignorant whether they look upon the Southern Commissioners as parties who might rightfully be seized, or whose

presence on board a neutral vessel would warrant its capture. Until the latter branch of the subject be fully discussed, and an intelligent opinion formed upon it, we cannot believe that the people will be content to rest satisfied with the inquiry on the point of form. Undoubtedly the form of using an international right may raise a substantive grievance. An abuse or contempt of forms in the intercourse betwixt a belligerent and a neutral on the high seas may be the method adopted by the belligerent to show his contempt for the neutral power itself,—a disrespect which, if not resented, may lead to grosser offences of the same kind. With all this in view, the people will not shut their eyes to the fact that the breach of form alleged in this instance is, that the belligerent cruiser took from the neutral the contraband of war, and did not carry the neutral vessel itself into port, that the question of contraband might be adjudicated upon by a Prize Court. The complaint of the neutral at first sight seems to be, that the cruiser was more scrupulous than he might have been by the law of nations. It is only at first sight that this view of the matter occasions any misgiving. When investigated, the real complaint regarding the form of capture is discovered to be, that a naval officer should have taken upon himself the functions of a judge, should have given judgment against the neutral without hearing parties, and by means of an armed force should have instantly executed his own decree, by there and then seizing the alleged contraband for his own purposes. From the earliest times, nations have looked with the utmost jealousy upon any attempt by belligerents to invest their naval officers with *quasi* judicial powers, either over enemy's ships or over neutrals. Even during times when naval warfare was conducted with far greater rigour than would now be tolerated, no power ever pretended to such a dangerous right as to make captors judges of the propriety of their own captures. Had any such monstrous rule been followed, there would have been no necessity, during the French war, of such a court as that in which Lord Stowell presided, and where, by a series of judgments distinguished by every judicial quality, he applied the principles of international law in a manner to command the homage of both hemispheres. The question, accordingly—which appears one of form merely—lies really and truly at the foundation of the law of belligerent and neutral rights. To concede such a form would be to destroy the whole system of law which successive centuries have been gradually rearing up. We

could scarcely expect officers of armed cruisers, with their rough and ready sea manners, calmly to investigate, and rightly to determine, questions which taxed all the rare ability of a Stowell, and which perplex the most industrious and ablest expounders of the law of nations. But we must not disguise that the act of the captain of the cruiser may be represented in a very different light, and doubtless will be so in the communication from the American Government, which may be made public before these pages reach the hands of our readers. It may be represented that the case was so exceptional, that it cannot with propriety be judged of by standards applicable to a very different state of society. No precedent, it may be argued, is laid down in the books as to how a mail steamer, belonging to a neutral power, is to be dealt with when discovered to have on board, amid her general cargo, or among her passengers, a small admixture of contraband of war. It may be pled with considerable force, that it would have been a grievous hardship to have taken the mail steamer, with all her important mercantile correspondence on board, and many innocent passengers, away back to some Federal port, where the question of the liability to detention of the two Commissioners could be tried by an Admiralty judge. Why compel a belligerent to do more harm to a neutral than he himself thought of inflicting? Is it not better, when a question of this kind, with regard to a mail steamer, occurs for the first time in international practice, that a precedent should be set whereby the least amount of detention and injury will be suffered by the neutral? That is Captain Wilkes' own argument when publicly speaking of the transaction in Boston. The Secretary of the American Navy, in his report to Congress, takes care to guard his department from being supposed to approve of such a precedent. He plainly intimates that the 'Trent' ought to have been taken as a prize, and that all vessels must be so treated in like circumstances in future. But the act having been done in Captain Wilkes' own way, it will be defended by the American Government from the plausible point of view which we have already indicated. Many persons in this country may be led away by the plausibilities, or by the feeling that the British Government has taken its stand on the wrongful manner in which the act was done, while less regard has been paid to the substantial legality of the act itself. When war may result, and the most grievous of all wars—a war with kinsmen speaking the same language, professing the same faith

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and appealing to the deeds of a common ancestry—it is absolutely necessary that the whole population be convinced of the justice of our quarrel; and no amount of investigation can be deemed too great on such a momentous issue.

We propose, therefore, to investigate the whole question, both of the legality of the capture, and the manner in which it was effected; and, we trust, in such a spirit as those points ought to be investigated, our national decision on which shall be reviewed by the impartial judgment of future ages. It is frequently said, both by Americans and by some amongst ourselves, that Great Britain ought to be the last power to take offence at the action of a belligerent, or to affect an over-zeal for the immunities of neutrals. If it be thus meant to insinuate that Great Britain, when a belligerent, ever acted lawlessly towards neutrals, it is an untrue reading of history. It has been her misfortune to be constantly a belligerent while the international code of sea warfare was being gradually adjusted; and Great Britain was identified with the maintenance, perhaps more than other nations, of certain belligerent rights which were the subject of fierce dispute, but throughout she has never presumed to take the law into her own hand, or to hesitate to obey the awards of her own or the Admiralty judges of other lands. Moreover, when war broke out betwixt maritime powers in 1854, for the first time since the great revolutionary contests at the beginning of the century were finished, the British Government, in concert with France, at once took the initiative to introduce modifications of the belligerent code as it affected commerce and the rights of neutrals. The modifications, when introduced, had reference only to the Russian war, although placed on a permanent footing by the Treaty of Paris, so far as regarded those nations which acceded to the proposals. America did not; but we question whether even the acerbity likely to be engendered by a long war with the Federal States, would induce the Government to revert to the old system. It was formerly the undoubted right of a belligerent to seize enemies' property on board a neutral vessel, whether contraband of war or not; and, again, to confiscate neutral property, whether contraband of war or not, found on board enemies' ships. Both of these undoubted rights of a belligerent were waived at the beginning of the Russian war; moreover, we abstained from issuing letters of marque,—an instance of self-denial which has not been imitated by either section of the late United States. It must not

hastily be concluded, therefore, that Great Britain is taking up a new rôle in endeavouring to limit the rights of belligerents, or to make war less intolerable to neutrals; for she has acted in modern times with singular disinterestedness, and with a sincere desire to render war less burdensome to all non-combatants. Her conduct must be judged by her recent policy, and not by those old matters of contention with the States, as to her right to search American vessels for British seamen, which are as obsolete as the frigates and razées which performed the obnoxious duty. While the Crown, at the beginning of the Russian war, limited belligerent rights, it also reserved certain indispensable powers, the statement of which will sufficiently indicate the line of argument to be followed in judging of the liability to capture of Messrs Mason and Slidell. 'It is impossible,' says the declaration in the *Gazette*, at the beginning of the Russian war, 'for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches.' Here, then, we have the utmost stretch to which the laws of modern warfare are disposed to interfere with neutrals; and it is under one or other of those categories that the Americans must bring the Southern Commissioners, before they can touch them on board a neutral. We need not trouble ourselves about the right of search, because that right is an undoubted accompaniment of the right to stop contraband of war or despatches on board a neutral. Without the one the other would be entirely valueless: the neutral might be full up to the decks with illegal cargo, and the belligerent be powerless to prevent it, from his inability to certify himself of the fact. The right of search must always be co-existent and co-extensive with the belligerent's determination to destroy the neutral's trade in contraband. When the time comes, and perhaps it may not be far distant, when 'free ships shall make free goods,' the right of search will become as obsolete as many of the older pretensions of maritime belligerents soon promise to be. The right to visit, to search, and to detain for search, says Dr Phillimore (III., sec. cccxxv.), is a belligerent right which cannot be drawn into question; it is a right which a belligerent may exercise over every vessel, not being a ship of war, or, as it is sometimes called, a public vessel, that he meets with on the ocean. He refers, in support of the proposition which he thus advances, to Bynkershoek, Valin, Vattel, De Martens, Kent, and Heffters. Lord Stowell, in the case of the 'Maria' (6 Robinson's

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Adm. Rep.), lays down the right of search in the most broad and absolute terms; and intimates that it will only cease when that golden age shall arrive (which Lord Stowell evidently considered in the light of a maritime millennium, not likely to be realized in this world), when, free ships making free goods, cruisers will cease to have the duty of search imposed on them. American jurists take the same view as our own authorities,—the only difference ever existing betwixt the two countries being, first, as to the extent to which the right was to be carried during war, and, second, as to the limited right of visitation which the British Government claimed during peace—the former having reference to the claim made by Britain to search American ships for British sailors, which led to the war of 1812, and the latter being claimed for the purpose of more effectually putting down the slave trade. On the existence of the belligerent right of search, there has never been a divergence of opinion betwixt the countries. Indeed, Kent, in treating of the question, cites the opinions of Lord Stowell as expressing the principles of international law on the point. Some discussion has been raised on the mode of bringing the vessel to for the purpose of search; but there appears to be no proper international ceremony applicable to the purpose, so that discussion would lead to little result. Apparently two guns were fired, the one across the bows in the usual manner; but at the second discharge it is alleged a shell was dropped near the 'Trent.' We have no means of knowing at what time the second gun was fired, or whether proper attention had been paid to the first, and no information as to the proximity of the shell to the vessel. On the whole, in the discussion of so grave a question, it is not necessary to overload the case with a matter of less moment, which cannot very well be brought under any international rules. Nor do we consider it necessary to enter into a recapitulation of the facts which took place on board the steamer. It is sufficient for our purpose that the Commissioners were forcibly taken from a neutral British ship, sailing from the neutral port of Havannah to Southampton.

The British Government regards both sections of the late Union as belligerents, and treats both with an impartial neutrality. The Federal Government, on the other hand, refuses to recognise the Southern Confederacy as a belligerent, but, on the contrary, persists in treating the war as an insurrection, and the hostile Southerners as rebels. This diversity of view may occasion some perplexity in the

discussion of the question ; but a perplexity to the Americans alone, if they shall attempt to argue the question upon such premises. If there is no war, in the ordinary sense of the word, but merely an insurrection of certain provinces which the Federal Government does not wish the world to recognise as war, then there can be no right of search. The descent of the 'San Jacinto' upon the 'Trent' would, in that case, not be the legal action of an armed cruiser upon a neutral, but a violent assumption of illegal powers over the ship of a friendly nation in time of peace. Regarded as the action of a belligerent towards a neutral during war, the case is explicable according to well-known principles of international law. But if judged of in the other point of view which has been indicated, the act of the armed ship assumes a much more serious complexion, and could not be tolerated by any country able to resent an outrage. The Americans are, accordingly, in the nature of things, forced to consider the cause of difference from the same point of view as ourselves ; and we may safely cease to hamper the discussion with any such view as that the Commissioners were mere rebels. The British Government would have insisted on the question being treated as betwixt a belligerent and neutral in any negotiations, whatever the American Government may have been disposed to assert ; because, having taken up our ground in the quarrel, and published to the world the position we had taken up, we could never permit British subjects, property, or ships, to be treated in any other manner than according to that position. The only possible phase, therefore, under which the question can be discussed, is the legality of the act as that of a belligerent against a neutral. A greater difficulty presents itself in the uncertainty of the position held by Mason and Slidell, whether they are to be regarded as diplomatic persons, ambassadors, or persons charged with such a diplomatic mission as to bring them within the category of ambassadors, or whether they are to be regarded as officers of the hostile Government proceeding upon a military mission to Europe. In all probability, they bore a mixed character. They were well known in America as being among the leading men of the Secessionists (ex-Senators of Congress), and their mission to Europe may be assumed to have been to promote the cause of the new Government in every possible way—by negotiating with European powers if that were possible, and by purchasing arms, providing money, and generally propping up the military and national cause of the Confederates as they might

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find opportunity. The fact that they were civilians, and not professional soldiers, would not affect the military character of their mission ; and especially in such a war as that now raging, where civilians become soldiers, and soldiers are engaged in civil employments, in such a way as effectually to destroy professional barriers, we do not think a fair construction of international law would permit of any shield being thrown over these men on account of their supposed civil and unmilitary position. As civilians, embarked upon such a mission as we must assume theirs to have been, they were capable of doing probably greater damage to the cause of the other belligerent than any high military officer. We think Lord Stowell's definition of 'despatches' will aid us in arriving at a true solution with regard to the position of these parties. In the case of the 'Caroline' (6 Rob. Rep. 460), he lays down this definition :—'It has been asked, What are despatches ? To which I think the answer may safely be returned, that they are all official communications of official persons on the public affairs of Government.' And again : 'The true criterion will be, Is it on the public business of the State, and passing between public persons for the public service ?' It is such despatches which a belligerent is entitled to prevent passing, and to seize upon if in possession of a neutral ; nay, not only to seize upon, but to have condemned as lawful prize, the neutral ship which carries them. Applying the definition to these men, there can be little room for doubt that they were official persons, intended to become the medium of official communications abroad on the public affairs of the Confederate Government. So regarded, we know of no principle of international law which could be cited in favour of the free passage of such officials on board neutral ships in the ordinary case. The arguments by which the noxious character of despatches is established, may with tenfold force be applied to 'living' despatches, in the persons of commissioners of distinguished ability. 'There are other acts of illegal assistance afforded to a belligerent,' says Kent, 'besides supplying him with contraband goods, and relieving his distress under a blockade. Among these acts the conveyance of hostile despatches is the most injurious, and deemed to be of the most hostile and noxious character. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature ; but in the transmission of despatches may be conveyed the entire plan of a campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war.'

The appropriate remedy for this offence is the confiscation of the ship. There would be no penalty in the mere confiscation of the despatches. The proper and efficient remedy is the confiscation of the vehicle employed to carry them; and if any privity subsists between the owner of the cargo and the master, they are involved by implication in this delinquency.' Wheaton, both in his work on International Law, and on Captures, expresses the same opinions, and adopts as his own, almost *verbatim*, the words of Lord Stowell in deciding the case of the 'Atalanta' (6 Rob. 440), which is the leading authority on this class of questions in the jurisprudence of the world. If the right of the belligerent to stop despatches be measured by the noxiousness of their character, and their capacity for injury, it is evident that the two Commissioners were far more noxious to the Federal Government, and far more calculated to do that Government serious, and, it may be, irreparable injury, than acres of despatches written direct from the bureau of Mr Jefferson Davis. So much for the Commissioners regarded as in the category of despatches, or official persons bearing official communications on the public affairs of their Government. If they be considered as military persons, or civilians upon some military errand, to purchase arms, negotiate loans, and generally to assist in the establishment of the Confederate Government, we are led very much to the same result. Wheaton (ii. 210) thus describes the law as to military persons:—'Of the same nature with the carrying of contraband goods, is the transportation of military persons or despatches in the service of the enemy. As to the number of military persons necessary to subject the vessel to confiscation, it is difficult to define, since fewer persons of high quality and character may be of much more importance than a much greater number of persons of lower condition.' Undoubtedly, two men of the rank of Mason and Slidell, engaged in obtaining money or buying arms, would do more damage than several battalions.

But what if they are to be considered in neither of the views above set forth, but in the higher character of ambassadors—would they still be subject to capture, and the neutral ship which carried them to confiscation? Hear Lord Stowell on the point (the 'Caroline,' 6 Rob. 461):—'I have before said that persons discharging the functions of ambassadors, are in a peculiar manner objects of the protection and favour of the law of nations. The limits that

are assigned to the operations of war against them by Vattel (B. iv., c. 11), and other writers upon those subjects, are, that you may exercise your right of war against them whenever the character of hostility exists : *you may stop the ambassador of your enemy on his passage* ; but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of middle-man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested.' Accordingly, after an ambassador has entered upon his functions, his despatches from or to the belligerent country are in a different position from the kind of despatches which we have above considered. 'The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake in any degree of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral State ; but your reliance is on the integrity of that neutral State, that it will not favour nor participate in such designs, but, as far as its own councils and actions are concerned, will oppose them. And if there should be reason to suppose that this confidence in the good faith of a neutral State has a doubtful foundation, that is matter for the consideration of the Government, to be counteracted by just measures of preventive policy, but is no ground on which this Court can pronounce that the neutral carrier has violated his duty by bearing despatches which, as far as known, may be presumed to be of an innocent nature, and in the maintenance of a pacific connection.'—(Lord Stowell, 'Caroline,' *supra*.) The law is thus laid down very clearly, that a belligerent may stop the ambassador of his enemy on his passage, however much the person of that ambassador and his communications may be respected after he has assumed his functions. Taking the Southern Commissioners, therefore, either in that capacity, in the capacity of military persons, or civilians on duty calculated to benefit the warlike operations of their Government, or general political agents, on a combined diplomatic and military mission, they seem equally to have been liable to be stopped by the Federal cruisers.

The delicate part of the inquiry, however, has still to come. When speaking of the penalty which neutrals incur by carrying despatches, diplomatic agents, military persons, or ambassadors, the

assumption is, that the neutral has hired or lent herself for the specific duty, and has cleared from some port of the enemy not blockaded, from some of his colonial ports, or is sailing to one or other of these ports, or to some locality in correspondence with such a hostile port. For example, if Mason and Slidell had been taken on board a British vessel not formed for carrying passengers, from some unblockaded port of the South, or had such a vessel sailing from such a port concealed despatches at the bottom of a chest of tea, as was done in the case of the 'Atalanta,' there would have been little room for doubt as to the result. But there is a very material change of circumstances in the case before us, which must necessarily affect the result. Had such noxious despatches as we have above adverted to been posted and sealed up in the bags of a British mail steamer sailing from South or North, or been entrusted as an ordinary packet to a ship whose special duty it was to carry packets, in the former case no belligerent could have insisted on the right of search, and in the latter there could be no legal capture or confiscation unless privity could be proved against the master. At this very time there are, we doubt not, many despatches passing both for North and South through means of our West Indian mail steamers, and the Cunard and Inman packets to Boston and New York; but it would be simply monstrous either for North or South to propose, as belligerents, to search the mail-bags on board these vessels, and to confiscate as a prize the vessel itself, should some hostile despatch be found on board. A different principle comes into play in such a case. The mail-bags are made up in a public department of State, and the sanction and seal of the Post-Office would be regarded by the law of nations much in the same light as the stamp of a public character upon a man-of-war. The latter cannot be searched by any belligerent, nor could a mail-bag be opened. The cargo and passengers on board a mail steamer have not this public sanction. The vessel, so far as regards both the cargo and ship, is a merchant-neutral, liable to be searched, and confiscated if in the act of carrying contraband. But what of her passengers? There is no direct precedent to guide us here; but Lord Stowell indicates in one case how differently the carrying of one or two passengers among a number must be viewed from the act of a neutral becoming specially engaged for the carriage of military persons in the service of the enemy. The 'Friendship' (6 Rob. 420) was an American ship engaged in transporting a number of French marines from Baltimore

to Bordeaux. Lord Stowell held, in the circumstances, that she was a lawful prize ; but, in the course of his judgment, indicated this exception to the general rule : ‘ Is it asked, Will you lay down a principle that may be carried to the length of preventing a military officer in the service of the enemy from finding his way home in a neutral vessel from America to Europe ? *If he was going merely as an ordinary passenger, as other passengers do, at his own expense, the question would present itself in a very different form.* Neither this Court nor any other British tribunal has ever laid down the principle to that extent.’ It is true, the Southern Commissioners were not returning home ; they were starting on their hostile errand,—an errand which the Federal cruisers were in the ordinary case entitled to prevent, and which, in the ordinary case, no neutral dealing fairly with both parties had a right to assist. But we cannot exclude this other consideration, which has a most important bearing on the rights of neutrals, that the two gentlemen came on board at Havannah, a neutral port, as passengers paying their own fare, among a variety of other passengers of all nationalities who were in the vessel. Is the captain of a vessel like the ‘Trent’ bound to inquire into the political antecedents of those who pay their passage and claim a berth on board his ship at a neutral port ? Or, having received on board an envoy or a military person in the service of one belligerent, is his ship liable to be confiscated as a prize by the other in consequence ? We are entitled to put the penalty as confiscation, because, as we have already hinted in the introduction, and as we shall immediately proceed to show, there is no such penalty known in law as the capture of the passengers. There is no precedent in the books for confiscating a passenger vessel because one or two out of many might be obnoxious to a belligerent—no such precedent connected with the old maritime wars ; and international law on these questions tending more strongly in favour of the neutrals, we can have no hesitation in holding that no Admiralty Court in Europe or in America, before the occurrence of the incident under review, would have condemned a passenger steamer as a prize for such an alleged infraction of neutrality. It is most important to keep in view that the port of departure and the port of destination were both neutral. Mason was to remain in London, and Sliddell to go to France—could the latter have been taken from the steamer betwixt Dover and Calais ? Are merchant-captains bound to guard against the risk of taking such a passenger ? Any obligation of that

kind would be an intolerable burden ; and one which, if due to a belligerent at all, is equally due to him by every ship that sails from every port in the kingdom, or towards it. In short, it is an impracticable obligation, and the penalty quite incommensurate with the offence. We would hold the same doctrines if Mason and Slidell had managed to embark at New York or Boston, and got safely out of American waters.

The results which we have so far reached, are, that the Southern Commissioners were persons whom the North, as a belligerent, was entitled to make war upon, and to punish any neutral found aiding them in their designs in certain ways. But that this does not warrant the belligerent endeavouring to seize as a prize a neutral passenger vessel, upon which these parties embarked at a neutral port, paying their own fare, and entering as ordinary passengers. We now come to consider what must be regarded as the very illegal action of the 'San Jacinto' cruiser, in the way in which it became possessed of the persons of these two Commissioners. Conceding, for the sake of argument, that the 'Trent' had no right to take them on board at Havannah—conceding that the vessel, by taking them on board, had committed a breach of neutrality, and laid itself open to punishment,—the mode in which the 'San Jacinto' acted was so contrary to international law, as entirely to preclude its claims. The right of search is undoubted ; but equally undoubted is the obligation which rests upon the cruiser not to take the law into his own hand, but to submit the ship, cargo, and passengers, against which he has something to allege in consequence of his search, to the decision of a Prize Court. In a report, drawn up so far back as the year 1753, by eminent English officials—Sir George Lee, then Judge of the Prerogative Court ; Dr Paul, his Majesty's Advocate-General ; Sir Dudley Ryder, his Majesty's Attorney-General ; and Mr Murray, afterwards Lord Mansfield, his Majesty's Solicitor-General—the following sentences occur, as descriptive of the mode to be followed in obtaining adjudication of prize :—' By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be or be not lawful prize. Before the ship or goods can be disposed of by the captors, there must be a regular judicial proceeding, wherein both parties may be heard ; and condemnation thereupon as prize in a Court of Admiralty, judging by the law of nations and treaties.' This report received the imprimatur of Lord Stowell, as truly

setting forth the course followed by the English Court of Admiralty. —(Phillimore, iii., sec. 440.) And, accordingly, Phillimore (*supra*) lays it down that the captor's title to his prize depends upon his obtaining a sentence in his favour from the proper tribunal. The captors have no right to make any spoliation or damage to the captured ship, or to embezzle or convert the property, or to break bulk, or to remove any of the property from the ship, unless in cases of necessity, or where obvious reasons of policy, or the urgency of the occasion, justify them in so doing. And in every case of a removal of property from a captured ship, the Court expects to be satisfied as to the propriety of the removal, before it will proceed to adjudication. If the capture is made without probable cause, the captor is liable for damages, costs, and expenses. Kent also, in the same manner, states the law thus:—‘When a prize is taken at sea, it must be brought, with due care, into some convenient port, for adjudication by a competent Court.’ And again:—‘By the modern usage of nations, neither twenty-four hours’ possession, nor the bringing the prize *infra præsidia*, is sufficient to change the property in the case of a maritime capture. A judicial inquiry must pass upon the case; and the present enlightened practice of commercial nations has subjected such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful.’—(Comm. Lec., v., p. 112, 113, ed. 1860.) And again:—‘Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration. It cannot be alienated or disposed of, but the possession of it by the Government of the captor is a trust for the benefit of those who may be ultimately entitled. This salutary rule, *and one so necessary to check irregular conduct and individual outrage*, has been long established in the English Admiralty, and it is now everywhere recognised as the law and practice of nations.’ The necessity for enforcing such a law is no less obvious than that the law itself has been an established part of the jurisprudence of the nations for a very long period. Delicate and difficult questions must constantly arise with regard to neutrals when a state of war exists betwixt two powerful nations—questions which never could with propriety be left to the judgment of naval officers. Take the case of the Commissioners. It raises a question of the greatest nicety, and which ought never to have been determined without the intervention of a judge hearing all parties for their interest. Captain

Wilkes solved it at his own hand, and without taking upon himself the responsibility which he would have encountered had he taken the 'Trent' into port. If, after hearing parties, the Prize Court had decided against the right of the captors, they would have been liable in damages and expenses. This is a valuable check upon reckless and lawless proceedings. By taking out the Commissioners, and allowing the 'Trent' to proceed, Captain Wilkes attempted to evade his legal responsibilities, but only to find himself opposed to the whole course of international law on the subject. He has committed a gross offence, one for which there is no palliation, and which, if the American Government attempts to justify, will show that they are completely blinded by the unfortunate position in which they are placed.

It is not our part to discuss what ought to be the policy of Government when international law has been thus wantonly infringed. It is ours only to endeavour to discover what the law of the case really is, leaving the course of Government to the enlightened criticism and discussion of the press.

ON THE LAW OF POSTPONED VESTING.

(Continued from page 581, Vol. V.)

CHAP. III.—OF POSTPONEMENT OF PAYMENT DURING THE CURRENCY OF LIFE INTERESTS AND ANNUITIES.

As at common law the usufruct of property may be separated from the fee without abridging the title of the fiar, so also, in a trust conveyance, the creation of a liferent interest for one party is not incompatible with the existence of an immediate vested interest in the capital for another. It is therefore a mere question of construction, whether the ultimate beneficial interest is intended to be vested in the institute *a morte testatoris*, or to be made contingent on his survivance of the liferenter; and had the Courts of England and Scotland seen fit to adopt the civil law doctrine, which makes contingency the criterion of vesting, the law upon this subject might have attained, ere this, a degree of certainty and precision not inferior to that which characterizes the doctrines of feudal tenure. But in the interpretation of trust deeds, in which equitable considerations are paramount, it was found to be impossible to resist the

introduction of the element of intention; and the result has unfortunately been, that after half a century of judicial investigation, involving, on the most moderate computation, the decision of more than a hundred cases on the suspensive effect of life interests coupled with ulterior destinations, the question of intention still remains as a disturbing element, the effect of which can rarely be determined without the aid of judicial interpretation.

It would be useless to attempt a discussion of the law of vesting, as affected by the creation of life interests, without making a full citation of authoritative cases; and as, from the extent of the subject, it will be necessary to resort to some arbitrary classification, we shall, for convenience of reference, arrange our commentaries upon the decisions under the following heads, viz.:—(1.) Vesting in the case of a fee-simple interest, burdened with a liferent, where there is no ulterior destination; (2.) Vesting where the fiar's interest is contingent upon his survivance of the liferenter (Destination over and survivorship); (3.) Vesting in the case of a fee-simple interest, burdened with an annuity of fixed amount; (4.) Vesting of postponed and contingent life interests; (5.) Vesting where a life interest is coupled with a power of disposal, either without or with a destination over.

Section 1. Vesting in the case of a Fee-simple Interest, burdened with a Liferent, where there is no Ulterior Destination.

This branch of the doctrine of vesting is not attended with any difficulty. The creation of a simple liferent interest has the effect of postponing the payment of the capital till the death of the liferenter, that is, to an event which must happen; and, if we assume that the destination is absolute, the fee must necessarily vest *a morte testatoris*. We may remark in the outset, that the division of the fee into shares makes no difference in the result; for it is settled that a bequest to a plurality of persons in shares does not import a right of survivorship; the share of each beneficiary being, in fact, a separate legacy. In the case of *Fowke v. Duncans* (1770, M. 8092), where the effect of simple postponement of payment upon vesting was first determined after an elaborate argument, the testator bequeathed, *inter alia*, to his two nephews one-half of his personal estate, in the proportion of two-thirds to the one, and one-third to the other; and, by a separate clause, he gave a life interest to his wife of his whole personal estate, contingent on her continuing

unmarried. One of the above legatees predeceased the testator. It was maintained on behalf of the next of kin, on the authority of Voet and Stair (Voet ad Pand. in tit. Quando dies leg., sec. 2 ; Stair, 1, 3, 7), and two previous cases (*Edgar v. Edgar*, 1665, M. 6325 ; *Belches v. Belches*, 1677, M. 6327), that as it was uncertain whether the time at which the legacies became due—viz., the wife's death—should ever arise during the lifetime of the legatees, the case was one of those acknowledged in the civil law, where the adjunction of a certain day rendered the legacy conditional ; more especially as there was a destination over to survivors, 'in the event of any of the legatees dying without issue before my will takes place.' The Court, however, decided that the legacies vested in the legatees at the testator's death ; and being also of opinion that the destination over was merely a conditional institution, intended to take effect *as at the period of vesting*, they sustained the claim of the surviving co-legatee and his heirs to the entire half of the succession (M. 8095, 8098). In the case of *Wallace v. Wallace* (1807, M. App., Clause ; No. 6), the same question was more simply raised upon the construction of a direction to trustees, after the decease of the longest liver of the settler and his spouse, 'to content and pay, or assign and make over, to the persons after named, the respective sums of money after specified,' viz., *inter alia*, a legacy of L.1000 to Alexander Wallace, his nephew (who survived the testator, but predeceased his widow). The Court, adhering to the principle established in the case of *Fowke*, found that the legacy vested in Mr Wallace at the decease of the testator, and was transmitted to his representatives. *Jordan v. Dickson* (22 June 1809, Hume, 268) presents the circumstances of both the previous cases in combination. In regard to the residue, which was appointed to be equally divided, at the death of the widow, among four individuals *nominatim*, it was a precise counterpart of the case of *Wallace* ; while in regard to the general legacies to Jean Jordan and Charles Dickson (with the benefit of survivorship), and to Mary Jordan (with a destination over), it left room for the special argument maintained in the case of *Fowke*. The Court, in this case, were of opinion, that the ulterior destinations were intended to take effect *as at the period of vesting* ; and their effect being thus eliminated, the vesting was found to have taken place at the death of the testator.

In the two following cases reliance was placed on the circumstance of the bequest having been given to the children of a family, as indicating an intention to reserve the benefit of the provision for the survivors at the term of the expiration of the liferent. In *Forbes v. Luckie* (26 Jan. 1838, 16 S. 374) the direction was, after the death of the testator's daughter, to whom a liferent was given, to pay the residue to the whole children of her body, share and share alike. The view taken by the Court is very distinctly expressed in the following passage from the leading opinion:—‘I do not think that the fee of the residue was prevented from vesting in these children, either by the circumstance that the term of paying to each child his respective share was postponed until after the death of the liferentrix, who survived the testator; or by the circumstance that a trust by executors was interposed for carrying into effect the intentions of the testator; or, finally, by the circumstance that the bequest of the residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim*’ (*per* Lord Corehouse, 16 S. 378). The other case to which we refer (*Matthew v. Scott*, 21 Feb. 1844, 6 D. 718) differed from *Forbes v. Luckie* only in that the bequest was a legacy of fixed amount, and was payable at the respective majorities or marriages of the children. That condition had been purified by the attainment of majority on the part of all the children before the action was raised; and the Court were unanimously of opinion that the continuance of the liferent could not prevent the shares from vesting at majority.

Kilgour v. Kilgour (18 Feb. 1845, 7 D. 451) carries us back to the arguments maintained at the close of the 18th century. The testator divided the residue of his estate into two equal shares, and, subject to his widow's liferent, one of the shares was appropriated to the payment of two legacies, and the other was given to the children of a class surviving the expiration of a second liferent interest carved out of this share. The vesting of the second half being evidently subject to postponement, it was argued that the vesting of the first half would fall to be deferred to the same term, on the ground that the testator must be presumed to have contemplated one period of division for the entire estate. The Court seem to have felt some difficulty in arriving at the decision, that the legacies constituting the first share vested *a morte testatoris*. There can be little doubt that the decisions in this and the very similar case of *Sterling v. Baird's Trs.* (12 Nov. 1851, 14 D. 20) were

correct, there being nothing in the circumstances of these cases to warrant a departure from the general principle.

We proceed now to advert very briefly to the cases involving postponement of payment until the expiration of a plurality of life interests. If a life interest is given to a plurality of persons in shares, the fee being payable either to one person or to several, the fact of the life interest being divided, will no more affect the question of vesting than the division of the fee would. *Calder v. Dickson* (4 June 1842, 4 D. 1365), decided by Lord Jeffrey in the Outer House, is a leading authority on this point. The settlement contemplated a division of the residue into six shares, two of which were settled by the testator in the following terms, viz.: 'One-sixth on his sister A, in life; and the other one-sixth on his sister B, also in life; and the principal or fee of the said two-sixths so to be life-tenanted to be paid, on the death of any of his said sisters, to the daughters of his brother, and of his sisters C, D, and E, equally among them, share and share alike.' Some of the testator's nieces having died during the currency of the life, it was argued on behalf of the survivors, that as the fee was destined to them, not *nominatim* or individually, but as a class, and by description only, there was the less reason to hold that the right to it was intended to vest when the life began to run, more especially as that class might not only be diminished by intermediate deaths, but increased by the birth of more nieces between the demise of the testator and that of the life-tenant. Lord Jeffrey had no doubt that every one of the nieces surviving the testator took a vested right to a share of the fund, though the extent of the share might be affected by the existence of children *post nata*. But as in this case there was no probability of future children of the class, his Lordship, on the authority of the case of *Scheniman v. Wilson* (25 June 1828, 6 S. 1019), gave decree for an immediate vesting. The judgment is chiefly remarkable for the distinct enunciation which it contains of a principle, the importance of which will be seen in considering the cases referred to in our next paragraph. Referring to the elements of intention, which were, in his Lordship's opinion, material to the question of vesting, he said, 'One is, that there is here no ulterior destination of the fee in the event of the failure of all the nieces to whom it is expressly provided; and the other, that there is no constitution of any accreting right to the survivors in the event of the failure of some of them, although provisions for such accreting

rights are made in other parts of the settlement, and as to other portions of the trust property' (4 D. 1367; see also *Rutherford v. Turnbull*, 30 May 1821, 1 S. 37).

In *Smith v. Lauder* (30 May 1834, 12 S. 646), and *Maxwell v. Wylie* (25 May 1837, 15 S. 1005), a liferent interest was given to certain persons and the survivor of them; and it was held that this did not suspend the vesting of the fee, although it involved the continuance of a separate usufructuary interest for two lives. *Maxwell's* case involved the specialty, that the residuary interest liferented by the testator's sisters, as already explained, was given in fee to the testator's *next of kin*, to whom the liferenters belonged. The Court held that the existence of a liferent interest was not incompatible with that of a fee in the same person; and as a question of intention, it was thought that it would be too violent a construction to infer, from the consideration of a liferent being given to the sisters, that they, though standing among his heirs *ab intestato*, were to be thrown out of all share of the residuary fee (15 S. 1011, *per* Lord Gillies).

The case of *Donaldson's Trs. v. Macdougall* (decided by the whole Court, 20 July 1860, 22 D. 1527) may be regarded as a critical decision on the doctrine of immediate vesting, as it embraced in its circumstances all the elements which had in former cases been unsuccessfully urged in favour of suspension. The settlor directed his trustees, after the death of the longest liver of himself and his wife, to *account for, pay, and divide or convey* the residue of his estate among certain parties *nominatim*, 'equally, or share and share alike, and to their respective *heirs or assignees*; declaring that if any of said residuary legatees shall die without leaving lawful issue *before his or her share vest* in the party or parties so deceasing, the same shall belong to' the survivors in equal shares. The grounds upon which a majority of the Court (the Lord J.-C. Inglis, and Lords Cowan and Kinloch dissenting) held the residue to have vested *a morte testatoris*, are epitomized in the leading opinion. They were in substance as follows: (1st) The bequest was in favour of the legatees *nominatim*; whence a presumption arises, that it proceeded from the testator's regard to themselves individually. This distinguishes the case from *Boyle v. The Earl of Glasgow's Trs.* (also decided by the whole Court, 14 May 1858, 20 D. 925), and the other cases of postponed vesting where a fee was given to children of a class. (2dly) The second ground of opinion was, that although

the term of payment was expressly postponed until the death of the surviving spouse, yet the only object of that postponement was, that the yearly revenue of the subject of the bequest should be received by the widow during the period of her survivance. (3dly) Although the precise date of the term of payment or performance was uncertain, yet the event must arrive; the case being thus distinguished from that of a bequest payable on an uncertain event, such as the majority or marriage of the legatees. (4thly) The destination to the residuary legatees, and 'their respective heirs or assignees,' indicated an understanding that the right to the bequest might possibly be vested in the residuary legatees before the expiry of the liferent; for otherwise it could not have been payable to their heirs at that term in their character as such (22 D. 1535). As to the survivorship clause, it was expressly contingent upon the circumstance of a legatee dying before his share *vested*; and although there is much force in the remark of the Lord Justice-Clerk (22 D. 1543), that the testator did not mean the time which had been discovered to be the term of vesting, but some specific time fixed in his own mind and known to himself, yet, as he did not specify the time intended, we think the Court were right in ascertaining it for him by the rules of legal construction, rather than by arbitrary conjecture.

There is, however, one exception to the rule of vesting *a morte testatoris* in cases of fee-simple interests qualified by a liferent. Having regard to the authorities, which will immediately be cited, we are fully justified in laying down the proposition, that a bequest to a mother in liferent, with remainder to her children as a class, does not vest until the death of the liferentrix, or until the dissolution of the marriage in the case of the fee being confined to the children of the marriage then existing. The case of *Watson v. Marjoribanks* (17 Feb. 1837, 15 S. 586) appears at first sight inconsistent with this view of the law; it having been there decided—according to the statement in the rubric—that in the case of a provision to children of a class, subject to a power of apportionment by the mother, who held a liferent of the fund, a *jus quæsitum* to some share of the fund vested, immediately on the death of the testator, in each of the children then alive. But although the First Division in this case held the deed of apportionment to be null, on the ground of the omission to allot any share to the representatives of children predeceasing the liferentrix, the judges do not seem to have at all contemplated the case of the possible emergence of children subsequent to the supposed

period of vesting ; nor does it appear that this contingency was clearly in view of the Second Division in deciding the subsequent case of *Forbes v. Luckie* (26 Jan. 1838, 16 S. 374), although Lord Corehouse says (p. 378), ‘ I do not think the fee of the residue was prevented from vesting in these children . . . by the circumstance that the bequest of the residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim*.’ The case of *post natae* was favourably considered by Lord Jeffrey in *Calder v. Dickson* (4 June 1842, 4 D. 1365 ; and see *Bloomfield v. Campbell*, 24 Nov. 1835, 14 S. 51), and in the two Second Division cases of *Provan v. Provan* (14 Jan. 1840, 2 D. 298) and *Johnston v. Johnston* (9 June 1840, 2 D. 1038), which Lord Colonsay referred to as having settled the law (see 14 D. 24, Note). In *Sterling v. Baird’s Trs.* (12 Nov. 1851), it was held that rights conceived in favour of children, not as individuals but as a class, subject to an annuity to the mother or to both parents, did not vest until the death of the annuitant or longest liver, as the case might be. This distinction was particularly dwelt upon in deciding the case of *Johnston*. The Lord J.-C. Hope said, ‘ The payment is to be made equally among the children as a class, and not to them *nominatim*.’ Lord Medwyn said, ‘ The case of *Wallace* was that of an individual ; there *dies cedit sed non venit*. And so was the case of *Marjoribanks*. But there is a great difference between a conveyance to children as individuals and as a class. The present case does not distinguish any one individually.’

If we except Lord Brougham’s incidental allusion to the subject in *Scott v. Scott* (24 July 1850, 7 Bell, 143 ; see 151), the question does not appear to have been again mooted, until Lord Cranworth, in deciding the case of *Pursell v. Newbigging* (10 May 1855, 2 Macq. 273 ; see 276), referred to the doctrine laid down in *Johnston v. Johnston*, for the sake of drawing a distinction between the case of suspension pending a liferent of the entire fund and that of annuities. Referring to the circumstance, that in *Johnston’s* case the fee was given, upon the death of the annuitant, to a certain class of persons, his Lordship observed, that, on the construction of the settlement, class was held to mean *persons alive at the death of the liferenter* ; but added, that ‘ although this doctrine of suspending may be made applicable to the case of an annuity as well as to that of a liferent, it requires much stronger language to satisfy your Lordships that there was an intention to suspend in the case of an

annuity than in that of a liferent.' The annuity in *Pursell's* case being of trifling amount, the House held that it did not create a suspension of the vested interest in the fee.

The latest authoritative decision on the suspension of fees destined to children of a class, is that of *Boyle v. Earl of Glasgow's Trs.* (14 May 1858, 20 D. 925), in which it was decided that the vesting was suspended until the period of payment. It is right to notice that, in the opinion of the consulted judges, reliance is placed on the express terms of the destination, which gave the fee on the death of the survivor of the spouses to the children *then existing*; but their Lordships add, that the limitation thus imposed entirely quadrated with the purposes announced in the commencement of the trust deed, and was eminently calculated to secure the complete implement of those purposes (which were, in the words of the granter, 'to make an additional provision for my daughter, Lady Augusta Fitzclarence, her husband, and their issue'); whereas any disregard of that limitation might in certain contingencies have in a great measure defeated the trustee's intention, and in the case that had actually occurred (of the assignment of her interest by a pre-deceasing child), would attribute to him an intention unwarranted by the terms of the deed (20 D. 940). *Wood v. Wood* was a somewhat special case. The truster gave a liferent of certain property to his wife, and added, 'The money left to my wife during her life, is at her death to be given to my nephews and nieces,—that is, to the children of my brothers, John and Patrick Wood; and to them I leave and bequeath said property, burdened, as aforesaid, with the liferent of my wife, Mary Denniston, and left entirely at her disposal in so far as regards the sums to be allotted to each, but on no account to be alienated from them.' Children were born to one of the brothers after the death of the liferentrix (who did not exercise the power of disposal conferred upon her); and the question was, whether these children were entitled to participate. Lord Cowan delivered the judgment of the Court, finding that the children to whom the fund was given were the children in existence at the death of the widow; the grounds of decision being—(1), that the testator had himself fixed upon that as the period of division, without any proviso in favour of children afterwards born; and (2), that the deed did not contemplate the prolongation of the trust after the death of the liferentrix. This decision appears to receive support from some of the earlier cases, such as *Mackenzie v. Holt's*

Legatees and other cases, in which the vesting was immediate, and which do not seem to call for special notice in this chapter. (*Mackenzie v. Holt's Legatees*, 1781, M. 6602 ; *M'Courtie v. Blackie*, 15 Jan. 1812, Hume, 270 ; *Grant v. Fyfe*, 22 May 1810, F. C. ; *Pearson v. Corrie*, 28 June 1825, 4 S. 119.)

NOTES IN THE INNER HOUSE.

FIRST DIVISION.

Advocation, Syme v. Harvey.

What is a Fixture?

IN this case the very important question arose for decision, What, as between landlord and tenant, is to be considered a *fixture*? It is necessary, before considering the effect of the judgment, to state shortly the circumstances of the case, in order to prevent its authority being carried too far. In 1853, Messrs Syme and Middlemass, who were nurserymen and seedsmen in Glasgow and its neighbourhood, obtained a five years' lease of the garden of Keppoch House from Mr Harvey, who in the present case is to be treated as the landlord. At the time the lease was entered into, the garden was not a nursery-garden. In the course of 1854 the tenants erected, at their own expense, a propagating house, which cost them L.40, a greenhouse, which cost them L.100, and a potting-house, the cost of which did not appear. In 1855 the garden was converted by Syme and Middlemass into a nursery-garden. In 1858 the lease expired, but the tenancy was continued for another year. During this last year, Syme and Middlemass having been sequestrated, their trustee proposed to sell and remove the erections above mentioned, when Harvey, who had known at the time that the erections were being made, interposed, and applied for interdict, at the same time demanding that the garden should be restored by the tenants to its condition before the lease. The Sheriff-substitute refused the interdict, but the Sheriff granted it. Syme, by an arrangement, came to be in right of the creditors of the copartnery, and hence the interdict was directed against him. It should further be explained, that the erections consisted of brick walls about three feet in height from the ground, with glass sides and roofs resting upon them. The case came before the First Division on a note of advocation, when their

Lordships recalled the Sheriff's interlocutor, and held that the tenants, who did not claim the brick foundations, were entitled to remove the glass sides and roofs of the erections. The *Lord President*, in delivering his opinion, said: 'The original law in regard to what was to be considered as a fixture in questions between heir and executor, was very decidedly favourable to the rights of the heir. But questions in regard to what was a fixture arose between parties in other relations, as liferenter and fiar, and landlord and tenant; and though the law had fluctuated, the general result of the cases coming under these different classes was, that it was less rigid in favour of the landlord, and more in favour of the tenant, than in any of the other classes. The reason for this was obvious. As new branches of trade arise, new uses of land arise; and as heritable subjects may become part of the effects of a trading company, they may be applied to uses of a more or less permanent character. The law in respect to questions arising out of such occupation must accordingly adapt itself, in virtue of the expansive power it possesses, to the changes which take place in the course of time. It is not fixed by statute, and must be applied to particular cases and particular questions, with a view to the whole circumstances in each instance. Applying these views to the present case' (his Lordship continued), 'I am of opinion that the rights of the tenant should prevail, and I think these are important elements for arriving at that decision. In the first place, it is important to look at the object for which the structures in question were made, the temporary character of the tenants' rights, and the costliness of the erections compared with the temporary interest of the tenants, and the purpose of the erections. They were erected at the expense of a company established as a trading company for the sale of fruits, flowers, etc., and for the use of that company in carrying on their business. The company held the ground for the short period of five years, and the erections were made after two years of the five had already elapsed. The rent was L.35 for the first year, and L.40 for the remaining four years—not a rent made low in respect of improvements to be made by the tenants, but a rent suitable to the place as it stood. The erections cost L.140, irrespective of the potting-house,—a sum equal to three-fourths of the whole rent for the whole period of the lease, and expended, too, after two years of the lease had elapsed. It is also important to look at the character of the structures, and the probable inten-

tion of the tenants as regarded their permanency. It appears from the evidence that they were purposely made less substantial than would otherwise have been the case, because the tenants had in view to remove them at the termination of their lease. I can scarcely conceive a case more favourable to the pretensions of the tenants. There may be a distinction in some cases between the parts of an erection which are fixed in the soil, and what is not so fixed. But I am not prepared to say that, had not the tenants conceded the point, I would have negatived their claim to remove the whole structures, including that portion which was fixed in the soil. . . . Suppose that a trading company, carrying on such a business as in the present case, had held land on a longer lease, and found that the business, as they carried it on, was not paying, I am not prepared to say that they would not be entitled to pull down such erections and substitute others of a kind more likely to be profitable, or to take away the bricks altogether, and convert the foundations into flower-beds. The erections are part of the machinery for carrying on their trade, and for which they may substitute another kind at their option. It is not necessary, however, to decide that question here.' *Lord Curriehill*, in his opinion, laid it down that, in order to the settlement of a question like the present, two elements were to be considered—1st, the nature of the erection, as in itself easily or not easily separable from the soil ; and 2d, the intention with which it was made. *Lord Deas* thought the elements mentioned by Lord Curriehill very indefinite, while admitting that they were the only ones which could be looked at. He then proceeded to contrast the case of heir and executor with that of landlord and tenant, in regard to the question of fixtures. In the former case he held that the presumption of permanency, and, therefore, of the erection being a fixture, was in favour of the heir ; while, in the latter, he thought that the presumption was the other way, and in favour of the tenant. He had no doubt that the tenant of a nursery-garden was entitled to carry away all the plants and trees in it, as these were his crop. The tenant of an ordinary garden would not be entitled to do so, although, probably, even he might carry away some of them, *e.g.*, those which he had planted the year before. He had great doubts whether the tenant in the present case was entitled to remove the brick foundations, but he had no doubt that, if required by the landlord, he was bound to do so.

In England, it would appear that, though not very firmly settled,

the rule of law is, that where tenants erect buildings, such as hot-houses, for the purposes of their trade, they are entitled to remove them. Lord Kenyon puts the reason of the rule thus, in *Penton v. Robart*, 2 East. 88: 'Shall it be said that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds on the erection of greenhouses and hothouses, etc., are obliged to leave all these things upon the premises, when it is notorious that they were even permitted to remove trees, or such as are likely to become such, by the thousand in the necessary course of trade? If it were otherwise, the very object of their holding would be defeated.' In the last case of the kind which went up to the House of Lords from the Court of Session (*Fisher v. Dixon*, 26 June 1845, 4 Bell, 352), Lord Brougham said: 'The Scotch law appears to me only to differ from the English law in carrying its principles, as laid down in the cases, a little further, rather than falling short of them.' The judgment in the present case justifies that opinion, and fairly represents the progress which our law has made in recognising tenant-right in regard to buildings erected for purposes of trade. Both the English and Scotch cases, however, distinguish between agricultural tenants and those who hold land for the purpose of trade, refusing to the former the privileges accorded to the latter. In England the Legislature has sought to remedy the evil results of distinction by the 14 and 15 Vict., cap. 25, which provides that, where buildings have been erected by the tenant of lands, at his own expense, whether for the purposes of trade or agriculture, and with the written consent of the landlord, he shall be entitled to remove them at the expiration of his lease, even though they are *solo annexa*, provided that he shall be bound to restore the soil or buildings to which they are annexed to the condition in which they were before their erection. There is as yet no similar Act in regard to Scotch tenants; but a decision like that in the present case, which settles so firmly the rights of trading tenants, while it refuses the same privileges to agricultural tenants, is very likely to lead to the introduction of a measure applicable to Scotland, with provisions like those of the 14 and 15 Vict., cap. 25.

SECOND DIVISION.

*Bruce v. Linton and M'Dougall.**Public Houses Act (16 and 17 Vict., cap. 67).**Evidence Act (16 and 17 Vict., cap. 20).**Civil and Criminal Proceeding.*

IN this case the consulted judges unanimously decided that, in a prosecution for bartering or selling spirits without a certificate under the Act 16 and 17 Vict., cap. 67, the defender is not competent and compellable to give evidence as a witness. This judgment seems to proceed on a sound construction of the Evidence Amendment Act of 1853, and to be in accordance not only with the theory on which criminal procedure is distinguished from civil in the law of Scotland, but with those principles of justice and policy which should govern all right systems of jurisprudence. Although the decision had special reference to the construction of the Evidence Amendment Act, it may be regarded as determining the broad and general question, whether procedure such as that contemplated by the Forbes Mackenzie Act is to be regarded as civil or criminal. The Act of 16 and 17 Vict., cap. 20, provides that 'it shall be competent to adduce and examine as a witness in any action or proceeding in Scotland, any party to such action or proceeding, or the husband or wife of any party;' 'but nothing herein contained shall render any person, or the wife or husband of any person who in *any criminal proceeding* is charged with the commission of any indictable offence, or *any offence punishable on summary conviction*, competent or compellable to give evidence for or against himself or herself, his wife or her husband, except in so far as the same may be at present competent by the law and practice of *Scotland*.' The suspender argued that this prosecution under the Public Houses Act was not a criminal proceeding in the sense of the Evidence Act, in respect that selling spirits was not in itself illegal or criminal, or *malum in se*, but only *malum prohibitum*; an offence against a statute, which statute, although it imposed a penalty, did not invest the act of selling spirits with any of the characteristics of a crime, or render the proceedings for the recovery of the penalty criminal proceedings. The statute made no provision for the proceedings being at the instance of the Procurator-Fiscal or public prosecutor, although, by the law and practice of Scotland, the concurrence of the public prose-

cutor was necessary in all actions pursued *ad vindictam publicam*, it being contrary to the general policy of the law to entrust the correction of public wrongs to private parties or to popular actions (*Darby v. Love*, 10 Feb. 1796; *Syme v. Murray*, 19 Jan. 1810). The Act of 16 and 17 Vict., cap. 67, adopted the procedure for the recovery of penalties prescribed by the previous Act of 9 Geo. IV., cap. 58, which provided that a warrant should be granted for summoning the party complained against to appear before the magistrate; and although under the later Act (sec. 16) it was made lawful for the magistrate, instead of granting warrant to summon, to grant warrant to apprehend, yet such warrant not being a warrant for incarceration, but simply a warrant to convey before the magistrate for the purpose of identification, did not change the character of the proceeding from civil to criminal. The penalty imposed was truly of the nature of a civil debt, and imprisonment followed only upon failure to pay the penalty, and might be put an end to at any period by payment. The imprisonment was plainly not a substantive punishment, but a means of enforcing payment, as in other cases of civil debt. Another test which brought out the distinction between the present prosecution and a criminal proceeding was this: that in such a prosecution the party complained against could be proceeded against and convicted in absence; whereas, in a proper criminal proceeding, not a single step could be competently taken unless the accused party were present.

The Court, however, disregarded these arguments, being of opinion, 1st, that the illegal transaction in question is, in the sense of the Evidence Act, an offence; 2d, that it is punishable on summary conviction; and, 3d, that the proceeding resorted to for imposing the punishment is a criminal proceeding. They arrived at the conclusion that the proceeding was criminal, not only from the phraseology of the statute, where such terms are used as 'guilty,' 'offence,' and 'conviction,' and in which previous conviction is made a quality or aggravation of the offence, and the punishment imposed on conviction is imprisonment in default of immediate payment of a penalty, but also on the broad general principle stated by Baron Hume in the opening chapter of his work, that every act is a crime 'for which our practice has appointed the offender to make some satisfaction to the public, besides repairing, where that is possible, the injury sustained by the individual.' In this sense the prosecution was a criminal proceeding, being *in vindictam publicam* in

modum pœnæ, for repression and punishment of an offence, and not *ad civilem effectum*, for enforcement of right or reparation of wrong between man and man. This judgment, which establishes a sound and practical criterion for distinguishing civil from criminal proceedings, is in conformity with the opinions of Lord Ivory in the previous case of *Stevenson v. Scott* (8 Dec. 1854, 1 Irvine 603), and of the Lord Chief Baron of England and Baron Parke in the case of *The Attorney-General v. Radloff* (Law Journal, N. S., 26 Excheq., p. 240). On general principles of justice and policy, it would seem most unjust to compel, and most inexpedient to allow the party complained against to be examined on oath as a witness in a proceeding where so serious a sentence would follow on his admission of the offence; and where, if really guilty, the only means of escaping punishment would be to commit perjury. In this, as in other criminal proceedings, it is no doubt often a hardship to an innocent person that he is not allowed to give evidence in his own favour; but this hardship might be much alleviated were the accused party entitled, if he thought fit, to make a statement or declaration of the facts, which would be received as evidence *quantum valeat*.

New Books.

Latin Phrases and Maxims, collected from the Institutional and other Writers on Scotch Law; with Translations and Illustrations. By JOHN TRAYNER, Esq., Advocate. Edinburgh: William Paterson. 1861.

WE have the most profound sympathy with the Junior Bar. The ordeal to which so many of their number are exposed—on the one hand, the social prestige of their profession requiring the maintenance of a position which in other spheres of life is either the result of a long life of labour, or, if inherited, is attended by a fortune equal to sustain it; on the other, the utmost willingness and power of work handed over to absolute inaction—is an ordeal perhaps as irksome and severe as will be found in the circumstances of social life. That many sink under it, or more wisely, as they feel their weakness, remove themselves from its temptation, is not a thing to

be wondered at. The wonder is, that so many should so long survive the sickness of 'hopes deferred,' and be present in the field to win at last, as in individual and yet not rare cases, the sure reward of pertinacious industry ; or, as by a larger class, the easy honours that proclaim the friendship, the good-will, and, above all, the discriminating professional zeal of well-appointed seniors.

For men so tried by fortune, allowance is to be largely made. If, here and there, a weaker brother perish in the struggle, or, sinking under the weariness of disappointed wishes, neglects to husband the strength of youth for the toil of manhood, it must not be forgotten that, while most men are capable of being made by circumstances, it falls only within the power of the few to make circumstances for themselves. The same spirit of indulgence must be exercised in other ways. If a young advocate courageously essays to employ the leisure which unappreciating agents force upon him, by taking an excursion into the field of literature, it may justly be forgiven to him that he has not reaped a very plenteous harvest, by the consideration that that was neither his primary nor his serious occupation. And those who are acquainted with the legal literature of the last ten years will acknowledge that the public has neither been slow nor unwilling to recognise the influence by which it is frequently inspired. We are very far indeed from insinuating that all that portion of it which has been contributed by the uninvested labours of the Junior Bar possesses the character or deserves to be estimated as works of mere pastime and recreation. Our remark implies nothing more than the fact, which is notorious, that the legal profession, more perhaps than any other, abounds with examples of leisure ambitiously seeking vent for its activities through the medium of the press.

These remarks, and others of a like general nature which we forbear to mention, have been suggested by the perusal of a little work, the production of Mr Trayner, advocate. And we could have wished that the result of our perusal had justified us in extending to Mr Trayner's book the spirit of indulgence to which we have just referred ; but there is a limit beyond which it is impossible to go without becoming reckless of the fact, that in overlooking one evil we may be creating others of a more serious kind. There are merits in Mr Trayner's book, and these we shall be careful to point out ; but its defects are so numerous, both in regard to execution and conception, that we cannot consent to deal with it on the footing of a

work written during intervals of leisure, by a very young member of the Bar, and committed by that circumstance to our merciful regard.

The motive which Mr Trayner avows in his preface for undertaking this publication, is one exceedingly creditable to his good nature. We do not exactly agree with the idea, that turning over the pages of Stair and Erskine, and mechanically extracting their technical language for the purpose of popular comment or construction, is the most worthy manner of dignifying the leisure of a learned profession. But Mr Trayner means to be serviceable; and if his ambition is to secure the approval of those who would aspire to serve beside him in the ranks of the profession, there can be no doubt that the royal road which he has paved to learning, has most justly earned for him his reward. There are those who think that the members of the Bar should be men trained to habits and tested by the standard of systematic scholarship; but many young gentlemen are notoriously of a different opinion, and the question in this matter, we must remember, is between Mr Trayner and them.

We could have wished a fuller statement in regard to the plan of the work. The title of it, however, would seem to imply that Mr Trayner, with the view of obtaining a complete list of the phrases and maxims in current use, has carefully ransacked the pages of the institutional writers in the law of Scotland, but has limited himself to this research. This plan, it will at once appear, is open to the very objection which it was obviously framed to anticipate. Our institutional writers were, doubtless, in their own way, and in the sense and to the extent of the scholarship of their time, very good classics; and they deal in technical phraseology to an amount from which, in the works of modern authors—most happily, as we think—we are comparatively free. But everybody knows, at the same time, that many of the maxims in familiar use in pleading, and in our legal literature, are drawn from sources to which our institutional writers had no access, or spring directly out of a compass and depth of original research, to which the writers of a former age were strangers. We readily concede to Mr Trayner that he has executed his task, within the limits he contemplated, with scrupulous exactness; but we do not the less hesitate to assert that his compilation does not contain one-half, or anything like one-half, of the aphorisms that have become celebrated in our law. Still there is much in Stair and Erskine which no person can afford to despise; and if Mr

Trayner thinks he can popularize their scientific knowledge to the extent of making it appreciably understood by those whom he introduces to an acquaintance with it, he is entitled to undertake the task, and he will know where to look for thanks. With this object in view, Mr Trayner is right, we think, in beginning with the very rudiments of the science ; but we sincerely trust that students of his book will not consider it necessary, in sympathy with the learned habit of the day, to point their language on all occasions by '*id est*,' '*vide infra*,' '*ut supra*,' and other maxims of the same expressive nature. We do not, on the other hand, object to a moderate use of the dead languages, and we shall at all times be glad to hear '*a fortiori*' in preference to '*a stronger argument*.' We might object to the title of Mr Trayner's book, that a Latin 'word' is not precisely what we understand by a Latin 'phrase;' but that is a trifling point. The result of it, with which we have mainly to do, is an explanation in the form of a dictionary of all the technical language—whether word, phrase, or maxim—that occurs in our institutional writers. This sets before us two parts—one having reference to the law of Scotland, and the other to the law of Rome. In regard to the former, we do not hesitate to express our conviction that, in the presence of such works as Bell's Dictionary, and Barclay's Digest, there is no room and no occasion for others of a similar nature ; and Mr Trayner will forgive our plainness in avowing a preference for their books to his. As respects the latter, we have a more serious charge against him than that merely of doing what has already been better done before him. If there is anything in the world that deserves to be studied as a whole, in its compactness and completeness as a system, it is the institutional writings of the Roman law. The idea of distinguishing its parts, in the hope of apprehending its essential principles, under an alphabetical arrangement of mere words, is as hopeless an endeavour as the attempt would be to imbibe the spirit of the Latin poets by the study of a '*Gradus ad Parnassum*.' We do not now intend—we do not think the occasion suggests it—to express our views in regard to the manner in which the Roman law should most properly be studied. At present we content ourselves with the remark, that a mind capable of approaching the subject according to the method indicated in this book, attests, as plainly as facts can make it, its utter incapacity to realize the study in its scientific aspect. That, holding such views, we should

decline Mr Trayner as a guide—though the loss may be our own—will not appear unreasonable.

But we would not be unjust to Mr Trayner. There are merits in his book ; and it is our duty, and, we are glad to be able to add, it is at the same time our inclination, to make these known. In travelling over the extensive and somewhat varied ground that he has yet before him, he has occasionally to deal with subjects, the practical bearings of which are difficult to understand, and still more difficult to explain. These arise more particularly in the department of feudal law ; and we have much pleasure in acknowledging that they are handled in a clear, precise, and intelligible manner, indicating powers of statement of a considerable order. In this respect, indeed, his book may be of service in the higher ranks of the profession in the sense that a Ready Reckoner is sometimes useful to a man of figures, who cannot always command the leisure to undertake personally the details of calculation. We are also glad to testify, on the whole, to the general accuracy of the book. Misstatements in regard to principles may occasionally be found ; though, not being in a position, from want of space, to verify our strictures by quotation, we ought in justice to withhold the allegation.

We have a single word to say in conclusion. The appearance of this book suggests the idea that a treatise on legal maxims, doing for the law of Scotland what Broom has done for the law of England, has long been an acknowledged want in the profession. The more intimate dependence of our law upon the Roman system would at the same time furnish the opportunity, in such a work, for much speculation of which our legal literature is not the less in need. If Mr Trayner has confidence enough in his resources to accept such an undertaking, we will be glad to wish him all the success that should reward so useful and honourable a cause.

THE MONTH.

Dispersion of Law Libraries.—The deaths of a few lawyers have been followed by the usual dispersion of their libraries. The most carefully selected follows the fate of the humblest—they all come to the hammer at last. And what miserable prices are often given for splendid works ! indicating the enormous change in value which a

few years have effected in certain classes of legal literature. Civilians, canonists, old French lawyers, are at a sad discount. They lie buried in undisturbed dust—perhaps some day, in a more reverent age, to be resuscitated. At present they are useless for any other purpose than to be stored in our public libraries, there to be kept till the day of their resurrection to a second life,—if it ever comes. It is to be wished that the executors of deceased lawyers would think better of it; and, instead of selling learned works at the price they would bring if sold for snuff-paper, would hand them over to the Advocates' Library—the national library of Scotland, and the great storehouse of legal books. Some such legacies have been given to the Library, but they have been far too few. The libraries of each testator would no doubt be kept entire, and for *consultation* in the Library only; and thus the name of the donor would be preserved in the daily recollection of succeeding generations. There is one case, however, in reference to which there ought to be no waiting for a *mortis causa* donation. Very summary and peremptory *inter vivos* proceedings ought to be taken. The Lord Justice-Clerk is the owner of two small legal treatises, not elsewhere to be found in the United Kingdom, and not for sale either on the Continent of Europe or America—*Paul Voet de Statutis*, and *Livermore's Observations on the Conflict of Laws*. By mistake, a competition for the latter book arose, at Professor More's sale, between the learned judge and the authorities of the Library; and thus a book, so far as printed, which was published at 3s. 6d., was knocked down to the Lord Justice-Clerk at L.4,—and would have been sold at 6d., had the authorities of the Library not informed the conductors of the sale that the book was scarce and valuable. Of course, it is just that kind of book that should be in the Library; and a proper representation to one who was among the most popular of Deans, and did so much for the Library, would have its due effect. But, of course, it must be as a matter of contract, and only on that footing could the volume be taken. It is quite obvious that it is not safe to allow any private person to keep two Armstrong guns like these for his own service, to be brought out quite promiscuously, without check or warning.

Amendment of Law of Evidence in Consistorial Actions.—Another attempt has been made to amend the Law of Evidence, by removing restrictions as to the admissibility of witnesses. Our readers are

aware that the pursuer and defender are not competent as witnesses in consistorial actions. At a recent meeting of Faculty, a motion was made by Mr Fraser, seconded by Mr Monro, for the appointment of a committee to consider the propriety of allowing the pursuer and the defender to be witnesses in actions of separation ; of nullity of marriage on the ground of impotency ; and in actions of damages for breach of promise of marriage. It was explained, that the reason why all other consistorial actions were to be left as at present, with the rule of exclusion in strict force, was the danger of perjury, and the extreme hardship of compelling parties to be witnesses against themselves. The argument appeared to be, that a woman pursuing a declarator of marriage against a wealthy man, had very great temptations to tell falsehoods, and that wealthy men run great risk of having marriages alleged against them, by women with whom 'they have had to do.' Then it was said that it was very hard to compel a defender to admit that he had committed adultery ; or, in an action of nullity of marriage, on the ground of propinquity, that he had committed incest ; or, in an action of nullity, on the ground of previous marriage, that he had committed bigamy. This is the old kind of reasoning, much in vogue when the agitation arose for the removal of restrictions on the ground of interest and relationship. Jeremy Bentham calls this 'the old woman's reason.' 'The essence of this reason is contained in the word *hard* : 'tis hard upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough ; for what it leads to is his being punished. What is no less hard upon him is, that he should be punished ; but did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it ? Whatever hardship there is in a man's being punished, that, and no more, is there in his thus being made to criminate himself—with this difference, that, when he is punished, punished he is by the very supposition ; whereas, when he is thus made to criminate himself, although punishment may ensue, and probably enough will ensue, yet it may also happen that it does not. What, then, is the hardship of a man's being thus made to criminate himself ? The same as that of his being punished ; the same in kind, but inferior in degree : inferior, in so far as, in the chance of an evil, there is less hardship than in the certainty of it. Suppose, in both cases, conviction to be the

result, does it matter to a man, would he give a pin to choose, whether it is out of his own mouth that the evidence is to come, or out of another's ?

No doubt the reasoning of the old philosopher will prevail at last, in this, as it has done in almost everything else. Indeed, there cannot be a better illustration of the power of a single mind than in the revolution which Bentham alone, has effected in the Law of Evidence throughout the world. The *early* editions of this century, of works on the Law of Evidence by English lawyers, are filled with *abuse* of the 'Rationale of Judicial Evidence.' The *later* writers quote the book with *approbation*, and the Legislature has embodied its author's views into Acts of Parliament. It is trusted that the Committee of Faculty, to whom the subject has been remitted, will take up the matter in a more liberal spirit than the mover and seconder of the motion seem to be prepared for, and recommend a reform that will settle the matter once for all, instead of nibbling at it, bit by bit, in this unsatisfactory way.

Consistorial Proofs.—The Conjugal Rights Act has now come into full operation, and, in accordance with its provisions, the proofs in cases arising under it are taken before the Lords Ordinary, in place of by the Sheriffs Commissaries. Proofs have been led in seven cases since the commencement of the Winter Session ; and in all, except one short *ex parte* case, the method has been adopted of taking the evidence by a short-hand writer. Several years ago we advocated the introduction of this system, and we believe that the experiment, so far as it has gone, has been entirely satisfactory, the saving of time effected by it being very considerable. Unnecessary delay seems, however, to be occasioned by dictating to the short-hand writer. In general, we think this might be advantageously dispensed with, as was shown in one case before Lord Jerviswoode. These cases being subject to review by judges who do not hear the witnesses, the evidence is taken very fully—mostly in the narrative form ; and although that form is probably in many instances more convenient than question and answer, we do not see why it should not be taken down question and answer by the short-hand writer (to whom the oath *de fidei* is administered), and afterwards written out by him in the narrative or deposition form, as is done constantly in important arbitration cases. This would save a great deal of time, and enable the counsel to proceed with the examination

of the witnesses without interruption ; and it is clear that an answer of any length must be much more accurately placed on record when taken from the lips of the witness, as the words are uttered, than when the judge repeats it from memory. Where a series of unnecessary questions are put, or a long and irrelevant answer given by a cross, the system of dictation might, however, be resorted to with advantage. We also think that the peculiarities in expression of a witness should be preserved as much as possible, instead of rendering them into English, as it were ; for, next to hearing the evidence, *that* must afford to the judges reviewing it the greatest assistance in forming an opinion as to the character and position of the witnesses.

We have another suggestion to make as to the taking of these proofs. The Act says that they shall be taken, ‘as far as may be, continuously ;’ but in the cases, so far as they have gone, only two or three hours a day have been devoted by the judges to that purpose. Now, it is plain the intention of the Act was, that the proofs should go on very much like a jury trial ; and that a great deal of expense would be saved to the parties by commencing at ten o’clock, after the Lord Ordinary has disposed of his motions, and going on till three.

The Chair of Public Law.—The *Gazette* of 13th December announces the establishment of a new Chair of Public Law in connection with the University of Edinburgh, with a suitable endowment ; subject, however, in terms of the University Act, to the approval of Parliament. We are not disposed to criticise the proceedings of the University Commissioners. No one can affect to doubt the importance of Public Law (including in that category Private International Law), as one branch of a liberal course of law education. There might be room for dubiety as to the possibility of securing the services of a qualified professor. But, though it must be confessed that the taste for jurisprudence has greatly declined under the hard pressure of an increasingly technical practice, we may safely assert that there will be no difficulty in finding, within the circle of the Scotch profession, candidates possessing the requisite knowledge of the subject, and the capacity of imparting that knowledge to others.

We ought not to omit to notice that a Chair of Public Law was formerly in existence in the University of Edinburgh, though we have not been able to learn that attendance on the lectures of this

Chair was ever enforced as part of the ordinary curriculum of legal instruction. The Chair appears to have been instituted by a grant from the Crown, of date 11th February 1707, by which there was annexed to the Chair a salary of L.150 per annum, payable out of the first and readiest fruits and rents of the bishopricks of Scotland. In consequence of the subsequent conversion of this salary into the form of a specific appropriation of bishops' rents, the endowment had increased until it amounted, in 1802, to L.350. The allocated fund was afterwards swept away by successive augmentations of stipends, which formed a preferable charge upon the rents out of which the professorship was endowed. And, although Mr Robert Hamilton, the last occupant of the Chair, succeeded in obtaining an allowance from the Treasury for his life interest, Government refused to continue the endowment after his death in 1831. Their decision need not excite surprise, when we add that, although the Chair had been filled by men of distinguished talent and learning, it was not found to be possible to secure the attendance of a sufficient number of students, and that, in consequence, the prelections of these gentlemen might, for all practical purposes, have just as well remained unwritten.

As it now seems to be admitted on all hands that Public Law ought to be taught to the students in our University, it would only be an act of justice to the new professor to require attendance on his lectures, as one of the qualifications for obtaining admission to the various professional bodies. The profession may rest assured that, however unexceptionable the appointment of the Crown may be, and however meritorious the course of instruction to be given by the professor, students will not attend unless required to do so. The first impulse of the student of law is to qualify himself for the practical business of his profession; and the studies necessary to the attainment of that object are usually found sufficiently abstruse and uninviting, leaving little leisure or inclination for digressions into the wider fields of public jurisprudence.

The Land Registers.—We had expected ere this to have been enabled to acquaint our readers with the results of the inquiry which has been instituted by the Lord Advocate into the machinery of the Local and General Registers of Land Rights. Our readers are no doubt aware that the investigation has been entrusted to Mr Morton, W.S., and Mr Bannatyne of Glasgow; and we need hardly say that

the inquiry could not have been placed in more competent hands. The report of these gentlemen will probably be issued early in January. The main question on which they have been desired to report, relates to the expediency of maintaining the local registers, though some other questions will probably receive a share of their attention, among which we may notice the system of indexing the registers, and the proposed use of the Ordnance Survey maps as a basis of classification.

There can be little doubt that the amalgamation of the general and local registers, by diminishing the number of records to be searched, would tend proportionately to lessen the chances of error in searching the records, as well as the expense of searching. On the other hand, the transmission of all deeds to Edinburgh, for the purpose of being recorded, would involve the expense of double agency. It is worth considering, whether we ought not to retain an officer in each county in connection with the Record Office, with whom deeds might be deposited for the purpose of registration, and whose business it would be to transmit all such documents immediately, at the risk of the Government, to the General Register Office in Edinburgh.

The Bar.—The following gentlemen were admitted members of the Faculty of Advocates on the 10th December 1861:—Mr Thomas M'Kie, Mr John Comrie Thomson, and Mr Alexander Asher. Mr David Wedderburn was admitted a member of the Faculty on the 17th December.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

FAIRWEATHER *v.* BLACKLOCK.—Nov. 26.

Reparation—Injury to Property.

This was an action of damages, in which two issues were sent to the jury—1. Whether the pursuer had suffered personal injury through the fault of the defender? and 2. Whether the horse and gig which he was driving were injured by the defender? On the first issue, the jury found for the pursuer—damages L.5; on the second issue, they found that the

horse and gig were injured through the fault of the defender, assessing the damages at L.12, but, in respect it appeared he had only hired the horse and gig, leaving it to the Court to enter up the verdict on that issue for the pursuer or defender as they should see fit. Since the trial, the defender had paid the L.12 to the owner of the horse and gig. The Court now entered up the verdict on the first issue for the pursuer, and, in respect of the payment of the L.12, found it unnecessary to enter up the verdict on the second issue for either party. Lord Curriehill dissented, thinking that the verdict on the second issue should have been entered up for the defender, seeing the horse and gig which had been injured did not belong to him; and he had therefore no title to sue for the damage thence arising.

Susp., WARNER AND OTHERS *v.* A. W. R. CUNNINGHAM.—*Nov. 27.*

Interdict—Water Right.

This suspension has been raised by Mr Warner of Ardeer and Mr Fullarton of Keredaw, to prevent Mr Cunningham of Auchenharvie from damming back the water which flows from Loch Stevenston, in the county of Ayr. Mr Cunningham is the proprietor of the loch, but Mr Fullarton has rights of servitude over it, while Mr Warner is the owner of a mill which is turned by the stream issuing from the loch. The Lord Ordinary on the Bills (Benholme) passed the note to try the question, but refused the verdict. The suspenders reclaimed, and the Court decided that the interdict should be granted on caution, thinking that less risk would be run by granting the interdict than by refusing it.

BILSBOROUGH (GRAY'S EXECUTOR) *v.* BOSOMSWORTH.—*Nov. 27.*

Conduct of Party—Discharge.

The pursuer sues as the executor of the late Anthony Gray, potato merchant, Manchester, who died in December 1860. The action is raised for an admitted balance of L.241, 4s., due on potato transactions, as between principal and agent, by the defender to Mr Gray. The defender admits this balance, and at once offers to pay it, on payment being accepted as a settlement in full of those accounts for potatoes between the defender and Gray. The late Mr Gray was the agent of the defender, who is a potato dealer at Abernethy. The pursuer's action for the balance is under reservation of all further claims by him against the defender, but none of these are stated. The Lord Ordinary (Ardmillan) was of opinion that the action was unnecessary, and therefore found the pursuer liable in expenses to the defender; but he decerned against the defender for payment to the pursuer of the said sum of L.241, 4s., conform to the conclusions of the libel, on the pursuer granting to him a receipt for the same as in full of all demands, on the transactions in potatoes between the late Mr Gray and the defender, as agent and principal. The pursuer reclaimed. After full argument, the Court recalled the interlocutor *in hoc statu*, found that the defender is liable to the pursuer in payment of the balance of L.241, 4s., provided the pursuer gives him a receipt as in full of all demands against him, and ordered the pursuer to state whether he was ready to grant such a receipt. If he is not prepared to grant such, the Court will dismiss the action.

DONALD v. DONALD.—Nov. 28.

Aliment—Conjugal Rights Act.

This case was an action of aliment at the instance of a wife against her husband. The question arose in it, whether the proof should, under the Conjugal Rights Act, which treats actions of aliment as consistorial causes, be taken by the Lord Ordinary himself, or, the case remaining in the Inner House, the proof should be taken by a commissioner appointed by the Court? The First Division consulted the whole Court on the question; and to-day the Lord President intimated that, although the statute was obscure, upon the whole their Lordships were of opinion that the action was still to be treated as an Inner House case, and that the proof should be on commission.

SAWERS v. SAWERS' TRUSTEES.—Nov. 29.

Trust—Payment of Debts—Interdict.

This was a suspension and interdict at the instance of the Rev. Peter Sawers, Free Church, Gargunnock, one of the trustees of the late Peter Sawers, bleacher, Nether Kirklin, for the purpose of preventing his co-trustees from paying L.400 to Mr Henry Sawers, the liferenter under the trust-deed, until after payment of debts, legacies, and annuities. The pursuer maintains that the legacies and annuities must be actually paid or exhausted, not merely provided for, before the liferenter gets anything. It was the opinion of the Court that the suspender had not set forth sufficient ground for demanding the interdict. He did not deny the averment of the respondents that there would be a large surplus of trust funds after providing for all the debts, legacies, and annuities. Of course, the trustees must make the payment on their own responsibility; for the Court gave no opinion as to the rights of parties,—they merely decided that the suspender had stated no sufficient ground for interdict. The Court, therefore, refused the note, with expenses.

Adv., DR WHYTE v. GERRARD.—Nov. 30.

Process—Removing—Sheriff Court Act.

Dr Whyte, of Banff, raised an action of removing against his tenant, Gerrard. In the summons before the conclusions he set forth the facts on which it was laid. The Sheriff (B. R. Bell), altering the judgment of the Sheriff-substitute (Gordon), dismissed the action on the ground that it was disconform to the schedule appended to the 16 and 17 Vict., cap. 80, in respect that it contained a statement of facts. The pursuer advocated, and the defender objected that the advocacy was incompetent, in respect the interlocutor of the Sheriff submitted to review dismissed the action on a point of form. The Court repelled the objection to the competency, holding that an interlocutor dismissing an action being in effect a judgment on the merit, is capable of being advocated. Counsel were then heard on the merits of the advocacy, the advocator maintaining that a removing being a possessory and not a petitory action, did not require to be in the terms of the schedule appended to the statute. The Court reversed the judgment of the Sheriff, holding that the 32d section of the Act, in giving jurisdiction to the Sheriff in actions of removing, provided that the summons shall (1st) set forth certain, and then (2d) con-

clude for certain things. The summons in the present action was therefore strictly in terms of the statute. The Court therefore advocated the cause, recalled the interlocutor of the Sheriff, remitted to him to proceed with the cause, and found the respondent liable in expenses.

CASE FROM QUARTER SESSIONS, PERTH, FOR OPINION OF COURT OF EXCHEQUER.—Nov. 30.

Exchequer—Statute 7 and 8 Geo. IV., c. 53.

This was a case submitted under the 7 and 8 Geo. IV., c. 53, by the Quarter Sessions, Perth, for the opinion of the Court of Session acting as the Court of Exchequer. The case was at first submitted to the Lord Ordinary in Exchequer. The Crown, however, having maintained that his Lordship could not entertain it, but that it must go before one of the Divisions, his Lordship reported it to the First Division. The Court were of opinion, although the Act was very obscure, that the case could not be disposed of by the Lord Ordinary. It would, therefore, be proper to remit to his Lordship to dismiss it. At the same time, they were not of opinion that the Court in one of its Divisions could not dispose of it.

Adv., W. AND G. FAIRLEY v. THOMSONS, RITCHIE, AND OTHERS.—Dec. 6.

Process—Advocation—Additional Pleas.

These were conjoined advocations, at the instance of the pursuers and defenders, of an action raised before the Sheriff Court of Lanarkshire. Messrs Fairley asked the Court to pronounce an order on both parties to put in additional pleas in law simultaneously, in order to prevent the one party shaping his pleas as an answer to those of his opponent. Thomsons and Co. objected to this, and maintained that, as they were in truth the respondents in the conjoined advocations, they were entitled to see their opponents' pleas before deciding as to their own. *Per Curiam*: It is no matter which party lodges his pleas first. The record is not closed, and it will be open to either party to object to closing till he has considered his opponent's pleas. The Court allowed both parties to lodge additional pleas in eight days, if so advised.

M'KELLAR v. M'KELLAR.—Dec. 6.

Process—Reduction—Alternative Issue.

This was a motion to set aside the verdict of a jury in an action for the reduction of a deed of settlement. Two issues were sent to the jury—1st, As to the incapacity of the granter; 2d, As to his having been circumvented. The jury found generally for the pursuer on both issues. The defender moved to have the verdict set aside, on the grounds that it was inconsistent with itself (in finding on the first issue that the testator had no mind, and on the second that he had a mind capable of being circumvented), and also contrary to evidence. The Court were of opinion that there were cases in which a man might be close to the verge of the two categories of incapacity and of weak capacity, so that it was scarcely possible to say to which he properly belonged. It was therefore necessary to examine the facts very closely, to see whether the present was such a

case. The opinion of the Court, though not without hesitation, was, that the testator, a blind man of ninety, did at times labour under incapacity, while at other times his faculties, though impaired, were not wholly obliterated, and therefore that the verdict of the jury in the circumstances ought not to be disturbed. It was said that the interest of the defender under the settlement was very small. That was very likely the case, and he might have merely acted inconsiderately; but still the want of motive to defraud or circumvent was not sufficient to prevent the deed being set aside.

STEPHEN AND SONS v. SWAYNE AND BOVILL.—Dec. 12.

Retention—Slip Dues.

This was an action at the instance of Alexander Stephen and Sons, shipbuilders, Kelvinhaugh Slip Dock, Glasgow, against Swayne and Bovill, shipowners, Glasgow. In 1855 the pursuers were employed by the defenders to repair their ship 'Hurricane,' which was accordingly placed in their slip. The repairs were completed in January 1856, when an account was rendered to the defenders amounting to L.3388, 14s. 9d. On 17th January 1859, it was agreed to strike off L.581, 14s. 9d., and the balance due was adjusted at L.2807. That sum was not then paid, though the pursuers say that it should have then been paid in cash; while the defenders allege that it was to be provided by trade bills for L.2000, and their own acceptances for L.807 at four months. The pursuers retained the ship in security for payment till July 1856, when the L.2807 was paid, reserving to them a claim for interest, slip dues, and damages. The present action was raised to make good these three claims, amounting respectively to L.73, 1s. 10d., L.740, 14s. 3d., and L.1000. The slip dues were calculated at certain fixed rates per day that the ship remained on the slip. The Lord Ordinary (Ardmillan) held that the pursuers were entitled to issues on all their claims; his Lordship, however, treating the slip dues as truly a part of the damages. The Court were of opinion that no issue could be given in regard to the slip dues and damages. Slip dues could only be demanded in respect of a contract between the parties, express or implied; but none such was set out by the pursuers.

Adv., SYME v. HARVEY.—Dec. 13.

Heritable and Moveable — Greenhouses.

In 1853, Syme and Middlemass, who were nurserymen and seedsmen in Glasgow, obtained a five years' lease of the garden of Keppoch House. These gardens were not then nursery-gardens, but in 1854 they were made so, the tenants erecting a propagating house, which cost them L.40; greenhouses, which cost them L.100; and potting-houses, the cost of which did not appear. In 1858 the lease expired, but the tenancy was continued for another year. In September of that year, Syme and Middlemass were sequestrated, and the trustee on their estate proposed to sell the glass houses. Harvey, who in the present question must be treated as the landlord, interposed, requiring that the gardens should be restored to their condition in 1853, but forbidding that the erection should be removed. The sale proceeded. Syme sided with the creditors, and is now

in their right in regard to the glass houses. Interdict was then applied for. There was no doubt that Harvey was quite aware of the changes which had been made on the gardens. The Sheriff-substitute refused it, holding that the subjects in question might be removed by the tenant. It should be explained that the houses consisted of brick walls about three feet high, upon which the glass roofs were placed. Syme only claimed the glass roofs, but stated that he was willing to take away the brick foundations also, if that was desired. The Sheriff altered the Substitute's interlocutor, and held that the subjects were heritable; but the Court reversed the Sheriff's interlocutor, and found that the tenant was entitled to remove the glass. *Per Curiam*: The original law as to what were fixtures to the soil in questions between heir and executor, was generally very favourable to the heir. The question also arose in other relations, as between liferenters and fiar, and between landlord and tenant. The law was less rigid in the last case than in any of the others; and as new trades arose, as land may become part of the effects of trading companies, it might be expected that the law regulating the rights of parties would change. It was not fixed by statute, but depended on principles which would admit of expansion in reference to the circumstances of each case. In the present case, the rights of the tenant must prevail; and they came to that conclusion on a consideration of the objects of the structures in connection with the business of a trading company, the temporary interest of the persons who erected them, and the costliness of the erections compared with the temporary interest of the tenants.

THE MAGISTRATES OF PERTH *v.* MRS DRUMMOND HAY.—Dec. 20.

Fishing—The Bermoney Boat.

This action commenced by a summons, of date 13th February 1856, at the instance of the Lord Provost, Magistrates, and Town Council of the City of Perth, against Miss Charlotte Elizabeth Richardson Hay of Seggieden, now wife of Henry Maurice Drummond Hay, Lieutenant-Colonel in the Royal Perthshire Rifles Militia; and also against three persons, her tenants of the fishings of Seggieden. The bermoney mode of fishing is thus described and commented on by Lord Neaves, who believed it to be contrary to law:—‘A pin or stake, or other *fulcrum*, is fixed in the *alveus* of the river, while another pin or fixture is fastened in the bank lower down the stream. Between these two points a rope is extended, along which a boat, called a bermoney boat, is made to play. In connection with the boat thus attached is another boat, being an ordinary coble, which, starting from the bermoney boat at the point or pin fixed in the stream, carries out the net for fishing into the current of the river. The tow rope of the net is left in the bermoney boat, and is taken back to land in that boat, in the line of the bermoney rope, while the outer end of the net is carried down the stream by the coble at a convenient sweep, and then landed near the pin on the shore, where the net is hauled in. The effect of this mechanism is, that the proprietor of the fishing can start with his fishing coble from a point further out in the stream than the fishers could gain by wading, so that, in a tidal river, the parties using this method can fish longer in each day at the same place than would otherwise be possible, being enabled thereby to fish not

only when the tide is out, but when it has risen so high that no one could stand in the water where the bermoney boat can reach. The bermoney boat is thus equivalent to a gangway or towing path projected into the channel, and affording an advanced basis for thence reaching the more central points of the stream, when these would be inaccessible without such a contrivance.' The First Division, by a majority, have adhered to the interlocutor of Lord Neaves, holding this mode of fishing to be illegal. The Lord President dissented, on the ground that the system was merely an improvement on fishing by net and coble, from which it was not distinguishable in point of principle. He could see no ground for the allegation that the stake, which was the only fixture, was injurious either to the navigation or to the fishing.

SECOND DIVISION.

Pet., GEORGE DUNLOP, FOR WARRANT ON DEPUTY-CLERK-REGISTER TO
DELIVER UP A DEED.—*Nov. 27.*

In this case, which has been for some time under consideration of the Court, the Solicitor-General put in and read an affidavit by the petitioner's agent, to the effect that the petitioner, Mr Dunlop, was executor-nominate under the trust settlement of Lord Elphinstone of 1854; that a suit had been instituted in the Probate Court in England by Viscountess Hawarden, Lord Elphinstone's eldest sister and nearest of kin, against the petitioner, on the ground that the said deed is not the last will of Lord Elphinstone, and that English counsel had given an opinion, that for Mr Dunlop's case it was necessary to put in and prove the *original* will. The petitioner, Mr Dunlop, asked the Court alternatively to grant warrant to and authorize the Deputy-Clerk-Register, or other officer performing the functions of the office of Lord-Clerk-Register of Scotland, to deliver to the petitioner or his agents the aforesaid disposition and settlement on his depositing in its place an official extract, and granting a receipt and obligation for redelivery of the same within such time and under such penalty as your Lordships may appoint: or otherwise to grant warrant to and authorize the Deputy-Clerk-Register, or other officer, to deliver up the said deed to any Depute-Clerk or Assistant-Clerk of Session, or to such person as their Lordships may appoint, to be by him exhibited in the said Court of Probate on all necessary occasions within the space of six months from the date of your Lordships' warrant, and thereafter returned to the record. It appeared that the later practice of the Court had been to grant warrant in terms analogous to the second alternative of the prayer; but that in the last case where such a warrant had been granted, the clerk had reported that he was not allowed to comply with the condition of not parting with the custody of the document. The Court was of opinion that they ought not again to grant a warrant under terms which they had not the means of enforcing. In the present case, as the production of the original deed appeared to be essential, they allowed it to be delivered to the petitioner on his depositing a certified extract, and coming under an obligation to replace the original within six months.

MRS HUTTON v. HER HUSBAND.—Nov. 28.*Process—Aliment.*

This was an action for aliment, in which the Lord Ordinary had pronounced decree in absence, as allowed by the Conjugal Rights Act. The defender reclaimed, and asked to be reponed. The Court pronounced an interlocutor in common form, remitting to the Lord Ordinary to reponer.

Pet., SCHULTZ v. ROBINSON AND NIVEN.—Dec. 5.*Maritime—Arrestment—Foreign.*

The vessel 'Ueckermunde,' of the port of Ueckermunde in Prussia, arrived in Leith on 25th September 1860. On 5th October following, she was arrested by the respondents, as creditors of a Mr Wittemberg of Stettin, alleged to be part owner of the ship. This petition for recall of the arrestment was presented by Mr Schultz, the captain, and also a part owner, on the ground that, before the date of the arrestments—viz., on 4th September—Wittemberg had sold his shares to Mr Kuhl of Stettin. In their answers to the petition, the arresting creditors maintained—1st, that the sale had not been completed, as required by Prussian law, at the date of the arrestments, because the transfer had not been recorded on the beilbrief, or ship's sailing title; and, 2d, that the sale was fraudulent and collusive. After various proceedings, the Court, on 20th March 1861, approved of a joint case for the opinion of a Prussian counsel, and directed it to be transmitted to the Secretary of the British Embassy at Berlin, for the purpose of obtaining such opinion. An opinion was returned, that 'it is not necessary, in order to the transference of the property of a vessel, that the sale should be recorded on the beilbrief, or in any public Court, or in any public register,' and that 'the want of the recording has no influence whatever upon the right of a purchaser.' In the case of two sales, the second transference being recorded first on the beilbrief, the counsel answered that the second purchaser excluded the right of the first. The respondents contended that this opinion was quite inconsistent, and could not be adopted by the Court. Further, that a ship could be arrested like any other moveable subject, and was not peculiar as regards the title. The Court held that it was clearly settled in the law of all maritime countries, that a written title was necessary to the transference of shipping property. The opinion of Prussian counsel in this case was in harmony with maritime law; and as it appeared that, prior to the date of the arrestments, the debtor had transferred his share by bill of sale, the arrestments were inept.

ANDERSON v. LORD MORTON'S TRUSTEES.—Dec. 6.*Property—Right of Way.*

The pursuers moved for a remit to a land surveyor, to ascertain the state of the footpath from Aberdour to Starleyburn, stating that at one end of the road there was a gate which it was troublesome to unfasten, and that at the other end there was a strong gate which was kept locked, that foot-passengers had to go over the wall by a flight of steps. They did not object to this gate being kept locked, if a turnstile were made in it. The public were entitled to have the obstructions removed. The Lord Justice-Clerk said that the path was adjusted in 1856, and the pursuers admitted that the path is in the same state now. No complaints

were made then; and it would not do for the pursuers to come now and say that they had been a great deal too soft in 1856. He was for refusing the motion. The motion was refused (Lord Cowan *dubitante*).

BORTHWICK (BLANTYRE'S TRUSTEES) *v.* THE LORD ADVOCATE.—*Dec. 6.*

Production of Documents—Closed Record.

Borthwick brought a suspension of a charge at the instance of the Lord Advocate on her Majesty's behalf, proceeding upon affidavit of danger by Donald Horne, Esq., W.S., Edinburgh, alleging himself to be *interim* receiver of Crown rents. The suspender, in his reasons of suspension, averred that 'the said Donald Horne is not an officer of the revenue,' and called for the production of Mr Horne's appointment. Mr Horne was agent for the respondent in the litigation. After the record had been closed, a proof was led, and certain documents found in Mr Horne's office were tendered in proof of his appointment, as also certain other documents, supplementary or explanatory of the others, which had been sent by the Commissioners of Woods and Forests. The production of the documents was objected to as having been in possession of the respondent, and not produced by him until after the record was closed. The Commissioner repelled the objection, and Lord Ardmillan, on appeal, sustained his deliverance. The Second Division, in respect of the importance of the question, ordered minutes of debate to be laid before all the judges. The Lord President (with whom Lords Ivory and Deas concurred) was for adhering, on the ground that the provisions of Act of Sederunt of 1828 applied only to writings founded on by the party, and which were in his possession, or within his power, at the time of closing the record. The documents here were not in that predicament, being merely adminicles of evidence required to obviate an objection raised by the suspender to the regularity or efficacy of proceedings preliminary to the applications on which the decree *ex facie* regular was obtained, and therefore were not, in the sense of the Act of Sederunt, writings 'founded on' by the respondent. The writings could not be held to be in the respondent's possession, or within his power. Mr Horne, who was the proper custodier of his own appointment, was not a litigant here. A majority of the consulted judges being substantially of the same opinion, the Second Division, on advising, adhered by a majority, Lord Benholme alone being of opinion that the provisions of the Act of Sederunt were applicable.

PETER BRUCE *v.* THOMAS LINTON AND ALEXANDER M'DOUGALL.—*Dec. 13.*

Civil or Criminal Statute, 16 and 17 Vict., cap. 67.

On this case, which involves the question, whether in a prosecution for bartering or selling spirits without a certificate, under the Act 16 and 17 Vict., cap. 67, the defender in such prosecution is competent and compellable to give evidence as a witness, the consulted judges returned opinions in the negative. The following opinion, in which the Lord President concurred, was signed by Lords Neaves, Mackenzie, and Jerviswoode:—We are of opinion that in a prosecution for bartering or selling spirits without a certificate, under the Act 16 and 17 Vict., cap. 67, the defender in such prosecution is not competent or compellable to

give evidence as a witness. The Evidence Act does not extend to any 'criminal proceeding' for 'an offence punishable on summary conviction.' We are of opinion—1st, That the illegal transaction in question is, in the sense of the Evidence Act, an offence; 2d, That it is punishable on summary conviction; 3d, That the proceeding resorted to for imposing the punishment is a criminal proceeding. We think that the summary prosecution under the Act 16 and 17 Vict. is a proceeding not for recovering a debt, to be ranked for, or enforced by, ordinary diligence, but for imposing a punishment which is to take the form either of a penalty to be paid, or of an imprisonment to be suffered; and as the thing prohibited is by that statute declared to be an offence, no element seems to be wanting that is required to make this process a criminal proceeding of the kind referred to in the Evidence Act, and therefore exempted from its operation. At advising, the Lord Justice-Clerk said that he concurred in the unanimous opinion of the consulted judges. Lords Wood, Cowan, and Benholme also concurred.

WESTERN BANK AND LIQUIDATORS v. BAIRDS.—*Dec. 20.*

Reparation—Issues.

After the record in this case had been closed, the Lord Ordinary had reported it to this Division, in order that the relevancy of the pursuers' case might be determined. At the date when the Lord Ordinary reported the case, the whole of the defenders had been assoilzied, with the exception of the Messrs Baird. As the record had been made up as applicable to fifteen defenders, there was great difficulty in eliminating the portions in the record applicable to the two remaining defenders. The defenders contended that the effect of the discharge was to extinguish the case against them also, and that no reservation in the discharge of the other defenders could have the effect of saving the ground of action against those not discharged. The Court being of opinion that the question thus raised was one of much difficulty, and that it could not be determined till the exact nature of the pursuers' claim was known, had ordered the pursuers to give in issues. The Court were now of opinion that none of the pursuers' issues could be allowed, because the questions raised in them were not raised in the record. The Court regarded the case as one based on joint delinquency, and under the second branch as based on fraudulent concealment and neglect, in which all the directors were jointly implicated. The pursuers' averments on record were all made on that footing. There was not in all the record a single charge of several delict. The pursuers' issues, however, set forth a case of individual delict. It would never do to give the pursuers an opportunity of establishing any one of the alternative cases. These issues could not be allowed, or any issues based on individual delict.

OUTER HOUSE.

M'MILLAN v. THE FREE CHURCH OF SCOTLAND.—*Dec. 12.*

The following are the issues now proposed by the pursuer, in the case of M'Millan v. The General Assembly of the Free Church:—

'It being admitted that, on or about the 24th of May 1858, the pur-

suer was minister of the Free Church congregation at Cardross, and that on or about the 1st of June 1858 he was a minister of the Free Church of Scotland—

‘ 1st, Whether, according to the contract of the Association or constitution of the Free Church of Scotland, a deliverance in a presbytery of the Church, preferred against any of its ministers, cannot, except in so far as appealed or complained against, be altered by said General Assembly, and after hearing parties or allowing them an opportunity of being heard; and whether the defenders, the General Assembly of the Free Church of Scotland, at their meeting in Edinburgh in May 1858, wrongously, and in violation of said contract of the Association or constitution, without hearing the pursuer, or giving him an opportunity of being heard, without the requisite appeal, or complaint, altered the deliverance of the Presbytery of Dumbarton, dated on or about the 1st of April 1858, and suspended the pursuer from his office as a minister of said Church—to his loss, injury, and damage?

‘ Damages laid at L.500.’

‘ 2d, Whether, according to the contract of the Association or constitution of the Free Church, it is beyond the power of the General Assembly of the Church to depose any of its ministers without his being charged with any crime or offence, and till after hearing or allowing him an opportunity of being heard in his defence; and whether, on or about the 1st of June 1858, the defenders, the General Assembly of the Free Church of Scotland, and the defenders, the Rev. Dr Alexander Beith, the Rev. Dr Robert Smith Candlish, and the Rev. Dr James Bannerman, or any one of them, without any crime or offence having been charged against the pursuer, and without finding him guilty of any crime or offence, and without having heard or allowed him an opportunity of being heard, wrongously, and in violation of said contract of the Association or constitution, deposed the pursuer from his office as a minister of the Free Church—to his loss, injury, and damage?

‘ Damages laid at L.3000.’

English Cases.

WILL—Children of a predeceased Child.—A testatrix devised real estate to trustees, to sell and stand possessed of the moneys to arise therefrom, upon trust to pay and divide the same equally between all and every the children of her deceased aunt, C. D., with a proviso, that in case any child or children of the said C. D. should leave a child or children who should be living at her decease, or who should live to attain the age of twenty-one years, then the child or children of each such child should be entitled to the share or shares which his, her, or their deceased parent or respective parents would have been entitled to if living at the time of her decease. One of the children of C. D. was dead at the date of the will, leaving children. *Held*, that the words of the proviso were large enough to include not only the case of children who were living at the date of the will, and who might afterwards die in the testator's lifetime, but also the case of such children as were already dead at the date of the will leaving children. *Held*, also, that, under a specific bequest of personalty, a gift of money will not include money at the bankers. *Kindersley, V. C.*: When a testator

directs that issue shall represent or stand in the place of, or be substituted for, a deceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will and before the time of his own death, or he may mean it to extend also to the case of a child who was already dead at the date of the will. The solution of the question, which of the two he intended, must, of course, depend on the language he has used in directing such representation or substitution. He may use language of such restricted import as to be inapplicable to any child but such as were living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both.—(*Loring v. Thomas*, 5 L. T. Rep. 269.)

DEMURRER—*Trustee and cestui que trust*.—A sum of money was deposited in the bank in the joint names of A. and B., and by an agreement, after reciting that A. claimed the said sum of money, and that the said sum had been deposited in the bank in the names of A. and B. on behalf of C., who had claims against A., in respect of which A. denied all liability; it was agreed between A. and B., that A. should 'forthwith commence, and duly and diligently prosecute,' an action for the recovery of the money; and A. and B. declared that they held the said sum of money on trust, in case no such action should be brought by A. within one month, or in case the same should be brought within one month, but should not be 'duly and diligently prosecuted with effect' by A., to pay the said sum to C. A. accordingly brought an action, which was tried in the spring of 1860, and afterwards a rule was obtained ordering a special case to be stated for the opinion of the Court. Before the special case came on to be heard, C. filed a bill, alleging that the action had not been 'duly and diligently prosecuted' by A., and praying that A. and B. might be ordered to pay the money to him. A. demurred to the bill for want of equity, on the ground that, until the result of the action was ascertained, the plaintiff was not in the position of *cestui que trust*, and had no *locus standi* in the Court. Demurrer overruled by Stuart, V. C.—(*The King of Portugal v. Russell*, 5 L. T. Rep. 277.)

INDICTMENT—*Previous Dismissal by Justices*.—An information was laid against the defendants before justices for a common assault. Upon the hearing it was dismissed, and the justices granted their certificate of such dismissal pursuant to sec. 27 of the 9 Geo. IV., c. 31. The prosecutor then preferred an indictment against the defendants upon the same facts, and inserted therein three counts: the first for an assault, doing grievous bodily harm; second, for an assault, causing actual bodily harm; and, third, for a common assault. To this indictment the defendants pleaded the former information for the assault, its dismissal, and the certificate of justices; to which pleas the prosecutor demurred. Held by the Q. B., that the certificate granted by the justices was a bar to the indictment.—(*Reg. v. R. J. Elrington and H. H. Elrington*, 5 L. T. Rep. 284.)

ACT OF BANKRUPTCY—*Fraudulent Preference*.—B. became security for C., in respect of certain contracts entered into by C., and also advanced to C. the sum of L.250, for which C. assigned to B. all his estate and effects, and then became bankrupt. C. proved that one object of the assignment was to enable him to call upon B. at any time to ward off other creditors, but that it was *bonâ fide* given as a security against the liability of C. as such surety and the loan of L.250. Held by the C. P., that, if there be an assignment of the whole of the property, with only a small and colourable exception, it is an act of bankruptcy; but if there be an assignment of part only, with a real and substantial exception, it is not an act of bankruptcy, unless fraud be proved, and that the advance of a *bonâ fide* sum of money in this case placed it *primâ facie* in the same position as if an equal amount of property had been excepted from the assignment. In this respect, therefore, the deed was not an act of bankruptcy. Willes, J.: Such sum

of money may be the means of enabling the bankrupt to proceed with his trade, and may be used for purposes beneficial to the creditor. It is not such a transaction as is necessarily, or *primâ facie* in our judgment, an act of bankruptcy. If that, therefore, were the only point in the case, we should have directed the verdict to be entered for the defendant. But there remains a most important question of fact, namely, whether upon the true construction of the bankrupt's evidence it ought to be decided that this deed was a pretence and wrong, concocted by the bankrupt and Reynolds, for the purpose of staving off the creditors. If there was the sinister object in the minds of the parties to delay and defeat the creditors in respect of their remedy against the rest of the property assigned—and we may put the case of an advance of L.1, and taking an assignment as security of goods worth L.1000, whereby the execution of the rest of the creditors would be interfered with—such a transaction would obviously be invalid. Of course, if it must be measured by the circumstances, all the circumstances must be taken into consideration.—(*Pennell v. Reynolds*, 5 L. T. Rep. 286.)

CORRESPONDENCE—Property.—Where letters were written and sent by A. to B., which letters afterwards came lawfully into the possession of A., who refused to return them to B.,—*held* by the C. P., that the paper on which they were written was the property of the receiver, and that the writer and sender who had lawfully obtained possession of them was liable to an action of detinue. Erle, C. J.: In this case, which was tried before my brother Channell, at Exeter, he laid down the law that, in the case of a correspondence between parties, where letters pass between them, the paper, at least, upon which the letters are written becomes the property of the party receiving them. In the case of a copyright it is different, as the copyright is in the person who writes it, and the person who receives has no right to publish it; but in the present case I have no doubt but that my brother Channell was right in his direction.—(*Oliver v. Oliver*, 5 L. T. Rep. 287.)

COLLISION—Lord Campbell's Act.—On the 5th November last, a collision took place between the 'Borodino,' of Boston, in America, and the 'Sunbeam.' The collision occurred within three miles of the shore of Great Britain, and the master and four of the crew of the 'Sunbeam' were drowned. The 'Borodino' had been arrested in a cause of damage by the owners of the 'Sunbeam;' and, on behalf of the representatives of the drowned men, an application was made to the Court to direct a citation *in rem* to issue against the vessel, for compensation in respect of their deaths. They contended that the 7th section of the Admiralty Court Act, 1861, extended the jurisdiction of this Court to questions of damage done by any ship, and that Lord Campbell's Act was therefore applicable. The Court considered a sufficient *primâ facie* case to have been shown, and directed that the citation should be issued.—(*The Borodino*, 5 L. T. Rep. 291.)

SLANDER—Action by Wife.—L., a step-brother of the wife of K., spoke slanderous words to K., imputing to Mrs K., amongst other things, gross levity, and asserting that she had been all but seduced by another man before marriage. K., acting on this imputation, dismissed Mrs K., and sent her to her father. Mrs K. (joining her husband as co-plaintiff, for conformity) brought an action against L., alleging her loss of the husband's consortium as special damage. On demurrer to the declaration, the Irish judges (by a majority of seven to two) held that the action lay, and the damages were not too remote. On error to the H. of L.: *Held* (reversing the judgment of the Irish Ex. Ch.), whether or not the action lay, the damages were too remote, for the special damage was not the natural and probable consequence of the injury complained of, seeing that no husband acting reasonably would dismiss a wife on an unsupported charge of gross levity, when no actual adultery was imputed (Lord Wensleydale dissenting). Campbell, L. C.: Where a person imputes to a married woman adultery, which he pretends to know and asserts as a fact, and the husband, reasonably believing the charge to be true, dismisses her, the wife is entitled to maintain an action (joining her husband for conformity) against the slanderer

for the special damage caused to her by the loss of her husband's consortium. Lord Wensleydale: A married woman cannot maintain an action for being deprived of the society of her husband by the slander of another upon her character, though the husband deserts her in consequence. But though no action lay in this case, yet the desertion by the husband was properly laid as special damage; for, to make words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated to follow from the speaking of the words, and need not be such as would reasonably follow.—(*Lynch v. Knight*, 5 L. T. R. 291.)

SUCCESSION DUTY—Deduction for Incumbrances.—The successor, tenant in tail in remainder, joined with his father, tenant for life in possession, in disentailing and resettling the estates to the use of the father for life, with remainder to the intent that the successor's mother should receive a rentcharge of L.1000 a-year after the death of the father, with remainder subject thereto to such uses as they should jointly appoint, remainder in default to the use of the successor for life, with remainder to the successor's first son in tail, with remainders over. Under a power in the resettlement the successor and his father subsequently jointly charged the estates with various incumbrances, viz., an annuity to the successor's son, to commence immediately and to continue during the life of the longest liver of the successor and his father; and moneys on mortgage from time to time partly for the benefit of the father alone, and partly for the joint benefit of him and the successor. On the father's death the commissioners assessed the duty on the full value, without allowing any deduction for the above incumbrances. On appeal from this assessment, it was *held*, by a majority of the Court of Ex. (dissentiente Bramwell, B.), that the annuity to the son and the mortgages were incumbrances created by the successor alone, and not in execution of a 'prior special power of appointment' under sec. 34 of the Act, and that the deductions claimed in respect of such incumbrances must be disallowed. The Crown having conceded that, reading Secs. 2, 5, 12, and 34 of the Act together, the successor was not liable to duty on the rentcharge to his mother, the Court expressed no opinion upon the point, but acceded to the view of the counsel for the Crown thereon.—(*Re Sir Henry Peyton, Bart.* (on appeal from the Commissioners of Inland Revenue), 5 L. T. R. 313.)

BILLS OF SALE ACT, 17 AND 18 VICT., c. 36—Registration of Document under—A Receipt for Money not a Bill of Sale.—The defendants, acting as the trustees of a married woman, purchased, under a power in the deed of settlement, goods, of the husband, and paid for them out of trust-money settled to her separate use, taking the following receipt:—'Received of Mr J. D. and Mr C. J., the trustees under the deed of settlement, for the benefit of my wife, the sum of, etc., for the purchase of my household goods and effects contained in the inclosed inventory and valuation, as purchased this day by Mr J. D. and Mr C. J., as trustees named in the deed of settlement, and empowered so to purchase by such deed. The date of such deed is 8th Nov. 1858. George French.' The goods remained in the husband's house, and were subsequently seized under *fi. fa.* at the suit of the plaintiffs, when the defendants claimed them. *Held* by the Court of Ex., that the receipt was not a bill of sale, or a document requiring registration under the Bills of Sale Act, 17 and 18 Vict., c. 36. Wilde, B.—I am inclined to adopt Mr Mellish's argument, that a bill of sale must be some document by which the property passes. This was clearly not such a document.—(*Allsopp and others v. Day and another*, 5 L. T. R. 320.)

ACT, 1 WILL. IV., c. 135, SEC. 2—Qualification by Rating.—The Rye Harbour Improvement Act, 1 Will. IV., c. 35, sec. 2 (local), provides for the appointment, as commissioners, of 'twelve inhabitant householders rated to the relief of the poor of the said parish, by one or more rate or rates, to the amount of L.10 per annum,' and by a subsequent section a penalty of L.50 is inflicted on any person acting without being duly qualified. An action having been brought for the

penalty against the defendant as an unqualified commissioner, a special case, for the opinion of the Court of Ex. on the construction of the above words of the 2d sec. of the Act, was stated by order of the learned judge (Cockburn, C. J.). *Held*, that a reasonable construction must be put on the words of the Act of Parliament, and that the words in question mean that a person, to be qualified, must be rated to the annual value of L 10, and not to such an amount as would render him liable to pay rates to the amount of L.10 a-year. Pollock, C. B. : To rest the qualification, not on the value of the property, but on the accidental payments a man may have made, would be absurd and inconvenient, and contrary to the numerous Acts which have been passed in reference to qualifications. An Act of Parliament should be clear and beyond all doubt, to warrant the Court in inflicting a penalty under it.—(*Easton v. Alce*, 5 L. T. R. 323.)

THEFT—*Friendly Society*.—A member of a friendly society was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, and was subject to the loss arising from the shop. H. had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of the management. The prisoner, also a member of the society, assisted in the shop without salary, and was indicted for stealing some marked money which H. had placed in the till. The money was laid in the indictment as belonging to H. *Held* by the Court of Criminal Appeal, that the money was properly laid in the indictment as belonging to H., and that the prisoner, although a member, could be convicted of larceny.—(*Reg. v. William Webster*, 5 L. T. R. 327.)

EMBEZZLEMENT—*Servant or Partner*.—Previous to 1855 the prisoner was in the prosecutors' service as cashier and collector, and another person, W., as salesman. In that year the prisoner and W. applied each for an increase of salary, and in the end the prosecutors agreed to allow each of them 12½ per cent. on the profits in addition to their salaries; and if there was no profit in any year, neither the prisoner nor W. were to contribute anything towards the loss, but were to receive their salaries only. The prisoner and W. from time to time, instead of receiving their shares of the profits at the end of the year, allowed portions of them to remain in the hands of the prosecutors at 7 per cent. *Held* by the Court of Criminal Appeal, that the prisoner was a servant of the prosecutors within the meaning of the 7 and 8 Geo. IV., c. 29, sec. 47, and liable to be convicted of embezzlement.—(*Reg. v. Donald M'Donald*, 5 L. T. R. 330.)

EMBEZZLEMENT—*Evidence*.—Upon the trial of an indictment, charging the prisoner with embezzling three distinct sums of money, it appeared, that on investigation of the books of a friendly society, kept by the secretary (the prisoner), it was discovered that he had not entered in the books subscriptions received by him in small sums of 1s., 2s., and 3s. at a time, amounting to more than L.100. The prisoner, on being called upon for an explanation, admitted that he had received the money, and was willing to repay the amount, and said that the law could not touch him. The books of the society kept by the prisoner were tendered generally in evidence on the part of the prosecution; whereupon it was objected on behalf of the prisoner, that the evidence should have been confined to the three particular entries referring to the three charges in the indictment. It was further contended for the prisoner, that it was a breach of trust only, and that the prisoner on these facts could not be convicted of embezzlement. The objections were overruled, and the jury found the prisoner guilty. *Held*, that upon these facts the jury might properly convict.—(*Reg. v. Wm. Proud*, 5 L. T. R. 331.)

MEDICAL ACT—*Recovery of Charges incurred prior to the Act*.—The Medical Act, 1858 (21 and 22 Vict., c. 90, sec. 32), does not make it a condition precedent to the right to recover charges for medicine and attendance, etc., supplied previous to the 1st Jan. 1859, that the name of the person seeking to recover

such charges shall be on the Medical Register.—(*Wright v. Greenroyed*, 5 L. T. R. 347.)

SHIPPING—Charter-party.—The charterer of a vessel shipped goods on board under a bill of lading signed by the master, by which the goods were to be delivered to B. or his assigns, he or they paying freight for the said goods as usual. B. was the charterer's agent, and the charterer was indebted to him at the time of shipment for advances; the bill of lading was handed by the charterer to B., that B. might apply the proceeds of the goods in reduction of the debt. B. took the bill of lading, with notice of the charter-party and its terms. *Held* by the Court of C. P., that as B. was agent of the charterer, with notice of the charter-party, he was not entitled to the goods without payment of the charter freight.—(*Kern v. Deslandes*, 5 L. T. R. 349.)

WILL—Meaning of 'Personalty,' etc.—Testator by his will and codicil bequeathed certain specific sums to charitable legacies, and by his will declared as follows:—'The proceeds of such part of my real and residuary personal estate, as the law does not permit to be given or appointed by will to charitable purposes, shall be first applied, so far as the same will extend, towards payment of such of the legacies herein mentioned as are not given to charitable institutions.' *Held* by Stuart, V. C., that the will and codicil must be read as one instrument, and that the words, 'herein mentioned,' comprised the legacies given by the codicil, as well as those given by the will. By his codicil the testator, 'after all his funeral, testamentary, and all other expenses were paid, and whatever legacies he might subsequently make, gave and bequeathed the residue of his property to the following charitable societies, to be divided equally amongst them,'—enumerating seven charitable societies. His property consisted partly of personalty savouring of realty, and partly of pure personalty. *Held*, that the direction in the will was sufficient evidence of intention to cut down the meaning of the word 'property' in the codicil to such part of the testator's personal estate as he knew the charities could take, that is to say, to the pure personalty. Stuart, V. C.—There is a plain indication that the testator knew there was one kind of property which he could by law give to charity, and another kind of property which he could not. He has given the general residue of his property to no one besides the seven charities; and if I am to decide the question whether the word 'property' was used so as to include a gift to the charities of property which the testator knew they could not take, that is a construction which I am forbidden to adopt, because the testator shows that he knew there was property which the charities could not take. If the context plainly shows that he knew that some of the property was such as the charities could not take, there is enough in the context to cut down the word 'property' to such property as the testator knew the charities could take. Therefore, upon the construction of the whole will, I think the word 'property' must be cut down to mean pure personalty only.—(*Jauncey v. The Attorney-General*, 5 L. T. R. 374.)

SOLICITOR AND CLIENT—Deed of Gift.—The testator in the cause in the year 1856, employing A. as his amanuensis, wrote to his solicitor B., requesting the solicitor to prepare the necessary deeds for transferring certain mortgages to A. for his own use and benefit absolutely. The testator added—'Also I wish to assign to yourself the bond of Mr F. M., which I have forwarded you.' Testator signed the letter and forwarded the same with the bond to the solicitor by A., who was then testator's confidential adviser. The solicitor accordingly prepared a deed, whereby the bond was purported to be assigned to himself, 'his executors, administrators, and assigns, absolutely for ever.' A power of attorney was included in the deed, enabling B. to sue in the name of the testator 'for his own use and benefit.' At the time of execution the testator expressed his wish that B. would enforce the bond against the obligor, who was a relative of the testator, with whom he was offended. Some discrepancy appeared in the evidence as to whether it was the testator, or C. on his behalf, who told B. at

this interview that the bond was an absolute and unconditional gift to him. The money was recovered by B. from the obligor, and afterwards, as he alleged, borrowed from him again by the testator. The testator died, and B. claimed the sum against his estate. Contemporaneous entries in the books of the firm of which B. was a member, were inconsistent with the view that the assignment was intended as a gift. *Held*, that, independently of the infirmity arising from the relation of solicitor and client, the evidence failed to show that the assignment was a clear, well understood act of bounty on the part of the testator.—(*Woodward v. Humpage. The Claim of W. Bevan*, 5 L. T. R. 378.)

PATENT—Costs of Opposition.—On petition the L. C. ordered the costs of objections filed to the sealing of certain letters patent, and of the petition, to be paid by the respondent who had made the objections. The objection was as follows:—‘I have reason to believe that the said Thomas Cobley has included in his provisional specification, or contemplates including in his final specification, an invention communicated to him by me in confidence, and for which I have applied for protection on the 15th March last. No. 642.’ On the 22d October 1861, a notice withdrawing the objections to the sealing of the letters patent was received at the Great Seal Patent Office. The petitioner made an affidavit, verifying the allegations contained in the petition. The Lord Chancellor having some doubt as to his power to award the costs of the opposition to the patent, reserved his decision, but subsequently made the following order:—‘Let the patent be sealed forthwith, and the costs of the objections filed to the sealing thereof and of this petition be paid by the respondent.’—(*Re Cobley's Patent*, 5 L. T. R. 387.)

SHIPPING—Insurance on Cargo.—The owners of a cargo of wheat from Odessa to England, insured such cargo for a sum of L.7000, being its estimated value, in two policies of insurance, one for L.4000, the other for L.3000. The market price of wheat subsequently fell, and the owners agreed to sell the cargo on its arrival for L.5358, 17s. On receipt of this sum, they handed over to the agents of the purchaser all the shipping documents of the said cargo, including the said two policies of insurance. Upon the one for L.3000 they indorsed as follows: ‘We transfer this policy to Messrs —, to the extent of L.1700.’ The ship and cargo subsequently experienced a total loss. The purchaser contended that he was entitled to the full amount of the L.3000, the amount insured by the second policy. *Held*, however, that the owners of the cargo might retain an interest in such policy to the extent of L.1300, not transferred by them by the indorsement. *Wood, V. C.*—As to the remaining difficulty about the *Rallis* retaining the L.1300 at all, and how far they properly come here under the circumstances, having parted with their interest, it appears to me that *Sharp v. Taylor* is quite applicable to that state of things. I think there might have been some doubt as to compelling the Marine Insurance Company to pay this L.1300. But they pay the money into Court, and all I have to do is to deal with the money in Court. *Sharp v. Taylor* appears to me a case quite as strong, if not stronger; for it was there shown that the plaintiff in the case had perjured himself, by describing the vessel as a British vessel, which it was not. The Court, however, there got rid of the difficulty, as Lord Eldon had done before, by saying, ‘Whatever difficulty these questions of public policy may interpose, if we had to enforce the remedy against those who would be entitled to rely on this public policy in order to prevent the remedy being enforced, still, when we are only dealing with a sum of money paid into Court by a person who could have raised the difficulty, and who has not raised it, we must distribute the sum of money, however wrong the parties may have been in regard to the transaction among them.’ I must therefore hold that the plaintiffs are entitled to the L.1300 out of the sum paid into Court.—(*Ralli v. The Universal Marine Insurance Company and Others*, 5 L. T. R. 390.)

THE

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ON THE LAW OF POSTPONED VESTING.

CHAPTER III.—(*continued from page 24*).

Section 2. Vesting where the Fiar's Interest is contingent upon his Survivance of the Liferenter (Destination over and Survivorship).

As it is an elementary principle in the law of vesting, that a condition annexed to a legacy prevents the acquisition of a *jus crediti* until the purification of the condition, it follows by necessary inference, that wherever the payment of a capital sum is made truly contingent upon the uncertain event of the legatee's survivance of the liferenter, the legacy will not vest until his survivance is an accomplished fact, but will lapse in case of his predecease. This simple proposition might be illustrated by supposing the case of a legacy payable to A. B. 'in the event of his surviving C. D.,' to whom a liferent is given. But this is not a style of contingent destination likely to occur in practice. The form in which a fee is *de facto* rendered contingent upon the fiar's survivance of the period of actual possession, is by the adjection of a destination over to another party in the event of his failing to survive the term of payment; or, in the case of legacies to a plurality of persons, by taking the destination to these parties jointly, or to the survivors of them. A destination over to survivors, or to third parties, in the event of the failure of the legatee *before the term of payment*, imports, beyond all question, a suspension of the vesting during the currency of the liferent; and, accordingly, amid the multitude of cases to which we shall have occasion to refer, it will be seen that the testing question has always been, whether the possibility of failure for which provision was made in the ulterior destination, was a failure at any

time before the expiration of the liferent, or merely a failure anterior to the commencement of the trust.

Before entering at large upon the doctrine of the construction of contingent destinations, it will be necessary to premise that a destination to heirs, or heirs and assignees, of the legatee, is not in point of principle a 'destination over' to the effect of leaving the fee-simple interest *in pendente* during the subsistence of the life interest; for the heir is in a sense regarded as the same person with the institute, and is not presumed to be nominated in the character of a person individually favoured. The destination to heirs is usually inserted with the view of preventing a lapse, in the event of the legatee predeceasing the term of vesting, whatever that may be; and if the terms of the deed are not in other respects incompatible with the existence of a vested interest *a morte testatoris*, the mere fact that the heirs of the legatee are called as conditional institutes, ought not to prevent the legacy from being transmissible by assignation during the dependence of the liferent.

Accordingly, where a lady conveyed the sum of L.1000 to trustees, with a direction to apply the yearly interest as an annuity to her nephew during his life, the principal to be 'divided and applied' to certain other parties *nominatim*, 'and to their respective heirs in case of their death,' and one of the legatees, Mrs Brockie, after surviving the testatrix, died before the expiration of the life interest, it was held that her legacy had vested on the death of the testatrix, and was carried by Mrs Brockie's general disposition in favour of her husband to the exclusion of her next of kin (*Marchbanks v. Brockie*, 18 Feb. 1836, 14 S. 521). 'The mere mention of her heirs,' said Lord Jeffrey, Ordinary, 'can never, after the cases of *Crawford* and *Leitch*, warrant the supposition that the trust was created in any degree for the purpose of protecting the conditional institution of unknown parties, by depriving the only named fiar of the power of disposal; it being manifest, in the Lord Ordinary's apprehension, that these words were introduced, not with any view of suspending the vesting, but solely to meet the contingency of Mrs Brockie herself predeceasing the testator, and the legacy consequently lapsing' (14 S. 524). It does not detract from the weight of this decision, that the cases of *Russell v. Crawford's Trs.* (6 Feb. 1824, F. C.), and *Smith v. Leitch* (2 June 1826, 4 S. 659, and 3 W. and S. 366), on which the Lord Ordinary founded, where legacies were held to have vested in a *last substitute*, were

not very apposite to the subject of decision,—a circumstance which was noticed by the Lord J.-C. Boyle, in moving the affirmance of the Lord Ordinary's interlocutor. In the recent case of *Cochrane v. Cochrane's Executors* (29 Nov. 1854, 17 D. 103), where a legacy of L.150, and a share of residue, were made payable to John Cochrane, 'or his heirs,' six months after the testator's death and when the same was freed from the liferent right of his spouse, the case was treated as one of first impression, the Lord Pres. M'Neill remarking, as to the meaning of the phrase 'or his heirs,' that it was only introduced for the purpose of preventing the lapsing of the legacy. We may observe, in conclusion, that the principle of decision in the cases of *Marchbanks* and *Cochrane* is quite consistent with the leading case of *Bell v. Cheape* (21 May 1845, 7 D. 614), which decided that a legacy to a party, 'his heirs and assignees,' was not assignable pending the period in which the vesting of the legacy remained suspended, without in any way implying that the destination to heirs and assignees had the effect of postponing the vesting.

It may be laid down as a general rule that, with the exception of the case of destinations in favour of heirs, which has just been considered, all ulterior destinations, whether in the nature of survivorship or remainder, are presumed to be in force down to the period of payment. It may not be easy to reconcile this principle with the cases of *Home v. Home* (28 January 1807, Hume, 530), *Jordan v. Dickson* (22 June 1809, Hume, 268), and *Thomson v. Cumberland* (16 Nov. 1814, F. C.); but it must not be forgotten that those cases were decided at a time when the law of vesting was in a state of comparative immaturity. So strong is the presumption for taking the term of survivorship as at the death of the liferenter, that we have found only one case among the decisions of the last half century, in which the testator's death was taken as the period to which the ulterior destination applied. We refer to the case of *Robson v. Shirreff* (20 July 1853, 15 D. 297), in which a destination of residue to children on the death of the longest liver of the testatrix and her husband, with remainder to the sisters of the testatrix, was held to have vested in the children *a morte testatoris*; but the decision turned upon the construction of some rather complex provisions; and the construction of the final destination to the sisters, was not very material to the real question at issue between the parties. The case of *Marnock v. Wilson* (2 March 1855, 18 D.

536), where heritable and other property was destined to a lady in liferent, and to her four daughters and their respective heirs and assignees in fee, with the benefit of survivorship, may perhaps be considered an exception. But in this instance there was no creation of a trust; and the Court, in giving the fee to the children who survived the testatrix, proceeded upon the rules of construction applicable to heritable destinations, where the presumption is always adverse to the suspension of the beneficial interest. (*Per* Lord Deas, 17 D. 541.) It is scarcely necessary to add, that if a destination over is *per expressum* made conditional on the event of the institute *predeceasing the truster*, such a substitution will not involve a postponement of the period of vesting. This point was decided in the case of *Foulis v. Foulis* (3 Feb. 1857, 19 D. 362).

We proceed now to take a rapid survey of the cases in which the Court has applied the established principle, that contingent limitations are suspensive of vesting, to destinations where the fee is subject to the burden of a life interest. In the important case of *Wright v. Ogilvie* (9 July 1840, 2 D. 1357), where there was a series of substitutions on failure of the legatee, the judges of the First Division were unanimously of opinion that the capital of the trust fund could not vest until the death of the truster's widow, who held a life interest in the estate; and in *Ross v. King* (22 June 1847, 9 D. 1327), the same result was held to follow, in consequence of the institution of a series of heirs in a trust conveyance of heritable property. The doctrine, that a destination over is incompatible with the acquisition of a vested interest at the death of the testator, had already been recognised by the Second Division in the case of a trust settlement of moveable property for behoof of the testator's daughter in liferent, and her children in fee, with remainder to the testator's heirs and assignees whatsoever (*Mowbray v. Scougall*, 9 July 1834, 12 S. 911); and the judgment in this case, which proceeded on a careful review of all the previous decisions, has been frequently referred to as a ruling authority.

Some indication of the principle that a clause of survivorship is virtually a contingent destination, may be found in *Bloomfield v. Campbell* (24 November 1835, 14 S. 51; *Dennistoun v. Dalgleish*, 22 Nov. 1838, 1 D. 69; and *Clelland v. Gray*, 15 June 1839, 1 D. 1031); but the first unequivocal recognition of the doctrine in connection with the class of cases under consideration, will be found in Lord Medwyn's opinion in *Robertson v. Richardson* (6 June 1843, 5

D. 1017),—a pure case of residuary destination to nephews and nieces in liferent, with remainder to their children in fee, and to the survivors in case of death without issue. That learned judge, in delivering the judgment of the Court, took occasion to observe, that in the case of a trust with an ulterior destination, if there were no indication of an opposite intention, the Court would not easily allow that destination to be defeated by holding the subject of the bequest to vest. If there were no trust, the presumption against immediate vesting was weaker. A residue, he thought, would not vest so easily as a bequest or legacy; the one being a definite sum, the other being indefinite, and depending upon an ultimate result; the payment of the one being *ex sua natura* immediate, whereas the other is necessarily postponed, and may easily be made contingent (5 D. 1126). The late Lord Justice-Clerk was very much averse to the recognition of distinctive principle in this class of cases, interfering as it would do with his favourite notion of referring everything to the intention of the testator, construed *per arbitrium judicis*; and he gave vent to his dissatisfaction in the subsequent case of *Wright v. Fraser* (16 Nov. 1843, 6 D. 78). But the suspensive efficacy of survivorship clauses was very soon after established, and extended to legacies as well as residuary bequests, by the decision of the First Division in *Newton v. Thomson* (27 Jan. 1849, 11 D. 452). The settlement gave the interest of L.1000 to a lady as a liferent annuity, the one-half of the capital to be equally divided between her two nieces, ‘or the survivor of them.’ In the rubric it is somewhat ambiguously stated that the interest of one of the nieces who predeceased the liferentrix, after conveying all her property to her husband, was held to have *lapsed*. But the fact is, that the Court had no difficulty in sustaining the claim of the survivor to the whole fund; for, as Lord Fullerton observed, a direction of this kind necessarily excluded the possibility of one of the parties defeating, by any deed prior to the extinction of the liferent, the absolute right attached to survivance by the will of the testator; the survivance in question not being the survivance of both legatees at the time of the testator’s death, but the survivance of one legatee in relation to the other. The interpretation of the destination in *Richardson’s Trustee v. Cope* (8 March 1850, 12 D. 805) was thought to be attended with considerable difficulty, by reason of the circumstance that, after limiting a liferent of residue to Mary Richardson, a married lady, and the fee to her children, Andrew

and Catherine, with a clause of survivorship in the event (which happened) of the death of one of them without issue, the testator proceeded to declare, that in case the said children or the survivor should not have arrived at majority when the liferent expired, the trustees were only to pay them the interest during minority, with a further destination in the event of either of them dying childless during the period of nonage. We confess we have some difficulty in following the argument upon which it was maintained that these incidental directions had a tendency to destroy the suspensive effect of the survivorship clause in the main destination; but it is satisfactory to find that the Second Division adhered by a unanimous judgment to the principle laid down in *Newton's* case, and found that 'the whole residue must be paid to the survivor at the time of the death of the said Mary Richardson (the liferentrix), in consequence of the death of Catherine, without issue, before the term of payment' (12 D. 867). Finally, in *Walker v. Park* (20 Jan. 1859, 21 D. 286), the judges of the Second Division subscribed implicitly to the doctrine, that a right of survivorship continues in force during the subsistence of the trust; the presumption against immediate vesting being, the Lord J.-C. Inglis observed, stronger in the case of a clause of survivorship than in a destination over (21 D. 291). The adjection of a clause of survivorship is now held to create so absolute a presumption for postponement, that although all the legatees may have predeceased the liferenter, and there can therefore be no survivor in a literal sense, the Court will not authorize a division of the residue among the heirs of the legatees, or even declare the extent of their rights, pending the subsistence of the life interest; the presumption being, that the testator had not intended to give a vested interest to any party anterior to the period of division (20 D. 1210, *per* Lord Pr. M'Neill, in *Cattanach v. Thom's Exr.*, 2 July 1858, 20 D. 1206).

In several of the decided cases the destination was complicated by the circumstance of the *liferent* interest being given to a plurality of persons successively (*Clelland v. Gray*, 15 June 1839, 1 D. 1031; *Wright v. Fraser*, 16 Nov. 1843, 6 D. 78) or jointly and to the longest liver. Such variations in the liferent destination can never affect the decision of the question, whether the beneficial interest in the capital has vested *a morte testatoris*. *Buchanan v. Downie* (12 Feb. 1830, 8 S. 516), and *Vines v. Hillou* (13 July 1860, 22 D. 1436), are examples of suspended vesting during the

currency of *joint* liferents ; the cause of suspension being in the first case a destination over, and in the second, a right of survivorship. In *Robertson v. Houston* (28 May 1858, 20 D. 989), where the destination occurred in a marriage contract giving the liferent to the longest liver of the spouses and the fee to the surviving children, the period of survivance was held, in accordance with settled principle, to be at the death of the longest liver, which, it was observed, must be the terminus in view of the testator in a deed which derived its whole operative qualities from the event of survivorship (20 D. 993, *per* Lord Ivory).

Section 3. Vesting in the case of a Fee-simple Interest, burdened with an Annuity of fixed Amount.

There does not seem to be any valid reason for inferring a suspension of vesting from the fact of a bequest of residue being burdened with an annuity of moderate amount ; for, although the trustees may in some cases be under an obligation to retain a portion of the capital in their hands as a security for the annuity,—in which case the fund so set apart will fall ultimately to the legatee (*Davidson v. Dobie*, 13 Feb. 1828, 6 S. 536),—yet an annuity, especially when charged on residue, does not necessarily deprive the fiar of the usufruct of his estate, but, on the contrary, may be cleared off by means of a present payment. Accordingly, it was observed by Lord Cranworth, in *Pursell v. Newbigging* (10 May 1855, 2 Macq. 276), that it would require much stronger language to satisfy the Court that there was an intention to suspend in the case of an annuity than in that of a liferent.

Of course, if there be no ulterior destination of the fee, as in the case of *Kerr v. James* (12 Feb. 1858, 20 D. 562), the fee will vest *a morte*, in accordance with the principles that have been already fully explained. The distinction in the law of vesting between annuity and liferent cases only arises in the event of the deed containing an ulterior destination ; in which case there is not the same absolute presumption for suspension during the lifetime of the annuitant that exists in the case of a liferenter. Nor will a clause by which the *payment* of the capital is postponed to the death of the annuitant, even when coupled with a destination over, or to survivors, be decisive of the matter of vesting ; for the question being mainly one of degree, the Court must be guided by the apparent intention of the testator (*Watson v. Macdougall*, 4 June 1856, 18 D. 971).

In addition to the cases of *Pursell*, *Kerr*, and *Watson*, already cited,—in all of which the residue was held to have vested *a morte testatoris*, notwithstanding the addition of a destination over,—we may refer to the two earlier cases of *Dobie v. Milne* (13 Feb. 1828, 6 S. 536) and *Bruce v. Moir* (28 June 1833, 11 S. 799); the one relating to a provision of heritage, the other to the residue of moveable estate, in which annuities were held to create no bar to the subsistence of an immediate vested interest in the *fiar*. In the more recent cases of *L'Amy v. Nicolson's Trs.* (5 Dec. 1850, 13 D. 240), and *Dickson v. Halbert* (13 Feb. 1851, 13 D. 675), the presumption was also held to be for immediate vesting. In the former case, the legatees were accordingly found entitled to an immediate payment, upon the surviving annuitant agreeing to renounce her interest.

The cases in which the vesting of legacies has been held to be suspended during the currency of annuities, have generally proceeded upon some specialty indicative of intention. In the cases of *Provan* and *Johnston*, which we have already had occasion to consider (2 D. 299, 1039), the annuities were settled upon married ladies; and the fee, being destined to their children, was necessarily retained to preserve the interest of children *post natæ*. The same explanation may be given of the case of *Thornhill v. Macpherson* (20 Jan. 1841, 3 D. 394). In other cases the vesting was held to be suspended because, by the express terms of the settlement, the fund was to be paid over, on the death of the annuitant, to the surviving institute *at that time* (*Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704; *Robertson v. Davidson*, 24 Nov. 1846, 9 D. 152). So also in *Pearson v. Cassa-major* (16 Dec. 1836, 15 S. 275), a direction to pay certain parties, or the *survivors* of them, when the capital sums 'become tangible by the death of the said annuitants respectively,' was justly held to import a postponement of vesting as well as of payment. The subsequent appeal, 18 July 1839, and application of the judgment, 2 D. 1020, did not affect the question of vesting. Those cases, however, are all exceptional in their character, and do not invalidate the proposition, that the creation of annuities affords a very slender presumption for suspended vesting.

Section 4. Vesting of Postponed and Contingent Life Interests.

A *liferent* being in its own nature a purely personal privilege, incapable of transmission to heirs, and *ex vi termini* contingent on

the survivance of the usufructuary, can never be acquired as a vested right until the commencement of the period of actual enjoyment (*Findlay v. Macintyre*, 11 Dec. 1849, 12 D. 325). Accordingly, a contingent or postponed liferent cannot vest until the occurrence of the event upon which the opening of the succession is contingent. For example, if one liferenter is substituted for another, his right will vest upon the extinction of the previous usufructuary interest; and the death of one of two joint liferenters will convert the survivor's *pro indiviso* half share into a simple liferent. The principle is illustrated by the case of *Thom v. Thom* (11 June 1852, 14 D. 861), where lands were conveyed by antenuptial contract to the wife's father in liferent, and at his death to the spouses in conjunct fee and liferent, and to the longest liver in liferent for the husband his liferent use only; and the marriage was dissolved by the wife being divorced during her father's lifetime. The Court, applying the rule laid down by Stair and Bankton, that the injured party's rights consequent upon divorce are the same as would emerge in the event of his survivance, found that the husband was entitled, after the death of his father-in-law, to the entire usufruct of the estate, including his wife's interest.

In liferents to several parties jointly, the right of survivorship is implied; and the fee will, accordingly, not open until the death of the longest liver. On the other hand, a conveyance to a plurality of persons for their liferent use severally, or in shares, will, according to the received rules of construction, vest only a *pro indiviso* interest in each of the liferenters defeasible upon his death. In the case of *Tulloch v. Welsh*, however, where the conveyance was to a brother and sister in liferent, for their liferent use allenerly, with a destination over, subject to the declaration that the yearly rents, profits, etc., should be paid to the liferenters during their lifetime, share and share alike, Lord Moncreiff held that a right of accrescion was intended to be given, by reason of certain words in the ulterior destination, indicating an intention that the fee should not open until the death of the longest liver (*Tulloch v. Welsh*, 23 Nov. 1838, 1 D. 94). The cases to which reference has been made in connection with the subject of the postponed vesting of fee-simple interests, present many examples of the creation of liferent rights jointly and in succession; but, in the general case, the interpretation of such destinations in trust settlements is not attended with

the difficulties inherent in the construction of direct conveyances in liferent and fee. Examples of the usual style of conjunct liferent destinations in trust settlements, will be found in the following cases: *Johnston v. Johnston*, 9 June 1840, 2 D. 1038; *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005; *Newbigging v. Pursell*, 9 Mar. 1853, 15 D. 489; *Robertson v. Houston*, 28 May 1858, 20 D. 989.

Section 5. Vesting as affected by Powers of Disposal and Distribution.

To avoid unnecessary repetition, we refer to the articles which have already appeared in the pages of this Journal, on the subject of the constitution and execution of powers of this description; from which it will be seen, that the existence of a power of disposal, however broad, does not, when accompanied by a destination over in default of exercise of the faculty, vest a right of fee in the appointer. Such being the case, it is obvious that the vesting of the fee (which is conditional on the exercise of the power) must remain suspended during the lifetime of the appointer. Such at least appears to be the necessary result, where a power is given to a liferenter to be exercised by way of settlement or disposition *mortis causa* (*Robertson v. Houston*, 28 May 1858, 20 D. 989); although a power of disposal extending over a limited portion of a succession will not have the effect of suspending the vesting of the residue as to which no such power has been given (*Donaldson's Trs. v. Macdougall*, 20 July 1860, 22 D. 1527). It is scarcely necessary to add, that, in the event of the death of the liferenter without having executed the power, the fund will not vest in his representatives, but in the residuary legatees of the granter of the power (*Hill v. Houston's Trs.*, 7 Dec. 1839, 2 D. 214; *Alves v. Alves*, 8 March 1861, 23 D. 712).

A grant of the liferent of a succession, coupled with a power of appropriating so much of the capital as may be necessary for the maintenance of the grantee, does not vest the fee of the succession in the nominal liferenter; and, accordingly, the unappropriated surplus will fall to the granter's heirs at the expiration of the liferent (*Sprot v. Pennycook*, 12 June 1855, 17 D. 840).

It appears to be settled by authority, that the existence of a power of distribution unexercised, does not prevent the immediate acquisition of a vested interest by the class amongst whom the succession is to be distributed (*Cowan v. Crawford*, 20 Jan. 1837, 15 S. 399;

Watson v. Marjoribanks, 17 Feb. 1837, 15 S. 587; and see Lord Rutherford's note in *Baillie v. Seton*, 16 D. 218); although the extent of the individual interests depends on the number of persons that may be comprehended in the class at some future time. It would seem that a power of distribution amongst an indefinite class of persons may be competently exercised before the arrival of the period of division; and, in that case, we presume the exercise of the power would confer a vested interest on the favoured beneficiaries (*M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398).

INTERNATIONAL LAW.

Entwicklung des Internationalen Privatrechts. Von Dr WILHELM SCHAEFFNER, Advokaten zu Frankfurt-am-Main. Frankfurt: Sauerländer. Edinburgh: Clark.

THE revival of the chair of Public Law may have excited the sneers of some who plume themselves on being 'practical' men,—people who affect to despise everything out of the beaten track,—who regard as worse than useless all legal knowledge, other than a familiarity with the Style Book, and Shaw, and Dunlop,—who have lost all sense of principle, from constantly looking only at details,—and who, in point of fact, from their minds ever running in the one continual rut, formed by precedent and practice, so far from being practical, are the most utterly useless and obstructive persons with whom it can be one's misfortune to deal. Ignorant themselves, they see no use for a liberal and refining process upon others. What is the Conflict of Laws, they ask, to a country writer? Will Voet help him in the framing of a summons, or Huber assist in the administration of a bankrupt estate? There are men with such ideas occasionally to be met with; but their opinions on the standard of legal education are happily not very important. The great majority of the profession are satisfied that admission to its different branches is at present too lax, and that, even at the risk of the manifest inconvenience which would follow from stopping the superabundant flow of fresh talent yearly pouring itself into the hopeless vortex, compulsory attendance on a more extended university curriculum is imperatively required. It is only by such means that a higher tone of professional acquirement seems possible of attainment. Therefore, though we have our own misgivings that the money devoted

to the new chair might have been more judiciously spent in the endowment of an additional professorship of the Law of Scotland, such as Commercial Law, its institution is a measure which, for the reasons above stated, we cannot but regard with the liveliest satisfaction.

It may be very true that, in the practical pursuit of the profession, occasions for the application of the rules of international law will be of comparatively rare occurrence. But the mere investigation of the controversies in which the great jurists of Europe and America have been engaged, besides enabling the young student to obtain clear conceptions of pure legal principles, constitutes the best mental discipline to which legal minds can be subjected. If the professor is at all worthy of his place, he will travel over the whole range of scientific jurisprudence; present, for the first time in this country, a connected system of natural law, and exhibit the development of its principles in the municipal systems of this and other countries, particularly in the law of Rome; and the application of these principles to the government of the intercourse of nations, in war and peace, and of the subjects of one state with those of another.

It is, however, difficult to imagine a more anxious task, than that which will be laid before an honest and conscientious man, sitting down to frame a course of 'not less than forty lectures' on international law. The task, indeed, unless he is familiar with the literature of France and Germany, will be almost hopeless. In the domain of public international law, something like system may perhaps be extractible from the decisions of Prize Courts, particularly the splendid judgments of Lord Stowell. But in private international law, the confusion that at present reigns, is perhaps without a parallel in any other branch of scientific study. It seems to have been the especial object of every writer, to contradict everybody else, and sometimes, like Mr Justice Story, to contradict even himself. It is very truly remarked by the author whose work is before us, that notwithstanding all the labours of so many jurists of different countries, the subject has by no means yet received anything like a satisfactory resolution. 'It seems, on the contrary,' he says, 'that the more the study of comparative jurisprudence is cultivated, the more will it appear that many of the principles hitherto held to be quite settled, are open to much doubt; and altogether new questions will occur, whose satisfactory determination will involve the fate of many of the theories on the subject hitherto prevalent.'

This conflict is, of course, chiefly due to the nature of the case. Among nations, an ultimate court of appeal, by which the practice of different judicatures might be guided and harmonized, is simply an impossibility. The judges and jurists of every country are left to deal with every question of international law after their own fashion, and in accordance with their own feelings and prejudices. The consequence is, that results have been reached in one country the exact converse of those attained in another; and in saying so, we grieve to add, we can make no exception in favour of our own courts. The union of England and Scotland under one Sovereign and one Parliament, yet on terms which made them foreign territories to each other as regards their respective systems of law, might have been thought favourable to the settlement of a uniform course of decision. But experience has shown the groundlessness of such an expectation. In *Lolly's* case, and others comparatively recent, the principles of the *jus gentium* had almost the novelty of a foreign code to the judges appointed to administer English law,—the only European system not founded on the Roman law, and so the most unscientific, narrow, technical one to be found in Christendom. Our own judges have approached the discussion of international questions with the larger views and the more liberal spirit derived from familiarity with the jurists of antiquity; still, their earlier efforts exhibit a hesitation, fluctuation, and in some instances a forgetfulness of principle, that cannot now be regarded with satisfaction. No one can read the admirable judgment of the House of Lords in *Don v. Lippmann*, without being convinced that many of the reported decisions of the Scotch courts on this branch of law will not stand the most superficial scrutiny. At the same time, we ought in justice to add, that this remark has no reference to the decisions of contemporary judges, some of which will bear comparison with the most elaborate judgments anywhere recorded.

Another reason may be assigned for the inexact and unsettled character of this branch of legal study. It is entirely the creation of comparatively recent times. When Rome ruled the civilised world, her lawyers did not require to busy themselves with the many intricate and difficult questions which have followed the establishment of numerous independent states. The '*Corpus Juris*,' as we shall presently show, contains not a trace of any rule or principle of the slightest use to the international lawyer. As a separate branch of jurisprudence, international law was not cultivated for some cen-

turies" after the revival of the study of the Roman law in 1135; although, in public international law, the famous 'Consolato del Mare' belongs to a much earlier date. The Italian glossators and their immediate followers found it necessary to investigate the collisions occasionally occurring between the statutes of different Italian states and the common law of Italy. In France, the confusion existing among its numerous *coutumes* begot the same necessity. A work entitled the 'Siete Portidas' contains the first of such attempts at laying down certain vague propositions for the settlement of international questions. The work of Burgundius, 'ad Consuetudines Flandriæ aliorumque gentium tractatus,' was published in 1621. Paul Voet's 'de Statutis eorumque concursu' appeared at Amsterdam in 1661. Huber's famous 'Prælectiones' followed soon after Grotius died, in 1646. From this time till the first half of the seventeenth century, numerous treatises appeared, such as those of Rodenburg, Froland, Boullenois, Alef, and others, which have laid the foundation of international law as a separate and distinct system; and of which the many excellent works which the present century has produced, such as those of Story, Livermore, Wheaton, Burge, and Felix, may be said to be the complement.

Of late years, the literature of Germany has been unusually rich in works devoted to the Roman law and philosophical jurisprudence. The work of Dr Schaeffner, which has suggested this article, is too slight in its proportions to have been intended to take very high rank. It has, however, merits of its own. He examines a crowd of authorities, and travels over the whole field, within a singularly moderate compass; but his work is more of the nature of an essay on the subject than an attempt to form a complete system. In one respect he is, for a German, sometimes very amusing, by his coolness in disposing of an adverse view, by characterizing it as 'höchst comische,' 'höchst pueril,' 'ganz lächerlich,'—reminding one of the strange courtesies that distinguished the fierce controversy that followed the Synod of Dordt, as to the Jewish observance of the Sunday, when a grave divine thought nothing of informing a reverend opponent, that he only wanted circumcision to be a perfect Jew! Of course, many of his positions are just as open to animadversion as some of those which he attempts to overthrow. At the same time, the book will well repay perusal; he sometimes speaks of some of our Scotch judgments in a tone of respect that is quite comforting. The work is divided into seven short chapters: the

first being a criticism on the opinions hitherto advanced as to the proper basis of a system of international law; the second, of status and capacity; the third, of real rights; the fourth, of obligations; the fifth, of marriage and divorce; the sixth, of succession; and the seventh, of the collision of civil process.

In sketching the history of the leading doctrines which have been laid down by writers on international law, Dr Schaeffner exhibits, with much humour, the amusing shifts to which the earlier authors were driven, who felt it necessary to rely entirely on the Roman law. It was natural that recourse should at first be had to that mine of learning for the settlement of every difficulty, and thus certain isolated and accidental expressions were perverted to a purpose inconsistent with any but a theological canon of interpretation. Many of the passages founded on (such as L. 20, de Jurisdictione, D. 2. 1; Tit. ubi de criminibus agi oportet, Cod. 3. 15; L. 3, ubi in rem actio, Cod. 3. 19) referred not to the collision of laws, but to the competency of particular actions and questions of jurisdiction. A passage everywhere paraded in these displays was the celebrated *Lex Cunctos Populos*, 1 C. de Summa Trinitate, which contains nothing but certain ordinances relative to the Christian faith. Many entertaining examples might be quoted of the ridiculous use which in this manner was made of the so-called written reason. For instance, Albericus mentions a case where a 'mercator Pergamensis' executed in Venice a testament according to the law there in force, and which gave rise to the question, Whether the testament ought to receive effect in the domicile of the testator? For the affirmative side, the L. 6, de Eviction., D. 21. 2, and the L. 1, D. de usuris, Cod. 32. 2, were quoted; and, on the other hand, those who adhered to the negative view cited the L. 1 C. de S. T. above mentioned, and made the triumphant rejoinder, that it could not properly be said that the testament was executed in Venice, 'quia testator ibi esset tantum ad tempus et mente Pergami!' The learned pundits of that period were entire strangers to reasoning such as will be found so lucidly set forth in the opinions of the judges who decided the recent succession case, *Purvis v. Purvis' Trustees*.

By and bye, however, a new theory was started which came nearer the truth. We refer to the division of statutes into *Statuta personalia, realia et mixta*. With whom this doctrine first originated cannot be stated with certainty; but the principle of it was, that a personal statute—i.e., one enacted for the regulation of the person,

absolutely or principally—followed him everywhere ; a real statute—i.e., one enacted with respect to things, and a mixed, that which governed a particular act, or had reference to persons and things indifferently, being strictly confined to the *territorium statuentis*. As to the two first, most men were agreed ; but the existence of the third was keenly contested, on the ground that a mixed statute was synonymous with a real statute. D'Argentié was its chief defender ; and among its opponents were included Rodenburg, Molinæus, Burgundius, Paul Voet, and Stockmanus.

The theory, however, whichever way it be received, was a comparatively slight advance towards sound principle ; for everything turned on the question, Does a particular statute govern persons or things, or does it do so principally or only partially ? ‘ In the controversy which followed, the question,’ says Dr Schaeffner, ‘ was reached, How comes it that a personal statute should have the power which a real statute does not possess ? Most of the old authors, however, either do not mention this question at all, or do not trouble themselves with making any answer, or content themselves with asserting a pretended *comitas*, in virtue of which the personal statute was recognised beyond the confines of the state to which it owed its origin.’

The next attempt in this direction was the division of statutes into *odiosa* and *favorabilia*—the former being confined to the *territorium statuentis*, the latter not. A controversy ensued similar to the one already mentioned, as to when a statute could be said to be odious, and when favourable ; it being soon entirely forgotten that the question, however answered, could afford no satisfactory criterion for the settlement of a collision of laws.

The division of statutes into real and personal is the cardinal principle of almost all the jurists who flourished down to the end of the last century. The doctrine was extensively received in Italy, Germany, Holland, France, Spain, and Portugal. It was never, however, adopted in the common law of England and North America, and has been uniformly repudiated in Scotch jurisprudence. ‘ The jurists of these countries,’ says Dr Schaeffner, when speaking of a collision of laws, ‘ had for the most part before them a concrete case, which they determined, not by classing it under one or other of the statutes above mentioned, but by the reasoning afforded by the nature of the thing itself, the thoroughly feudal character of the common law in regard to landed property being strictly exclusive of

the operation of every other, and so practically operating in the same way as that which is with us called a real statute.' Practically, the expression, personal statute, is now used to signify the laws in force in the domicile of a person ; and the phrase, real statute, is equivalent to the *lex rei (immobilis) sitæ*.

Coming to the systems of international law propounded in our own time, their most striking feature seems to be the pertinacity displayed by their authors in trying to lay down one general principle, designed as the keystone of the whole, and intended for the settlement of every case of conflict which by possibility could occur. The philosophical love of unity was never bestowed on a more worthless and unsympathizing object. The attempts which have been made to reach a point which, from the very nature of the case, is plainly impossible, form not the least entertaining portion of this well-contested field. Dr Schaeffner, with characteristic simplicity, starts with the observation, ' The fact that hitherto no one has succeeded in laying down maxims which would have been sufficient for the satisfactory adjustment of all cases of collision, is not only interesting as a history of doctrines, but is also highly instructive for those who would further engage themselves with the theory of private international law.' One may profit as much by another's errors as by his most unexceptionable precepts ; and if any one wishes to be satisfied that international law is not to be treated in the manner mentioned, he has only to read a few of the more recent writers of the Continent on comparative jurisprudence.

Obviously, any general principle cannot be intelligibly expressed, so as to cover all, or even the great majority of cases, without at the same time being stated in such general terms as to be practically worthless. For instance, both Thibaut and Mittermaier start with this principle,—' Every person is, in general, to be judged of in all his legal relations according to the laws of his own domicile,'—a maxim which is not only not, as stated, strictly accurate, but is otherwise so vaguely expressed as to afford us no practical assistance when we come to deal with the differences of laws in detail. Not much better is the axiom, that ' every judge has in general, in cases of collision, to look only to the laws of his own country,'—a principle which simply states the difficulty, without attempting to solve it. More to our purpose, however, is the doctrine enunciated by Zacharia :—' Every right and obligation arises exclusively under

the laws of the country in which the right or obligation (so far as conformable to the said laws) could have been made good, or was maintainable, and, in the given case, has been made good (*geltend gemacht wird*). The foundation of this rule, which in effect is but a repetition of the maxim, "*leges non valent extra territorium*," lies in the independence of states. For, were it possible that the law of one particular state could, as such, be carried into execution in another state, we would be extending the legislative power of the former; attempting, in fact, a usurpation of the legislative power of the latter—that is to say, of its supreme right of sovereignty. The application and execution of the laws of the one would fall to be entrusted to the courts and officers of the other; the rules by which they would have to proceed and determine would be prescribed for them by a foreign government; and how would they be entitled to carry these rules into effect, when they were only organs or servants of the government by which they were appointed? Dr Schaeffner devotes several pages to the criticism of this proposition; but it is unnecessary to follow him into an examination of the many fallacies with which he thinks it is loaded. To us, it appears that, although states, of course, are not at liberty to violate each other's independence by enacting laws for cases which do not occur within their own confines, the doctrine overlooks the difference between the creation of a right and the making it effectual, *i.e.*, the carrying it into execution; and therefore, when the forum happens to be other than the *locus contractus*, the forum, before issuing its decree, is bound to apply, not its own law, but the law under which the rights of parties were settled; for, as Dr Schaeffner remarks, any other principle would enable a debtor to modify at pleasure the character of his obligation by shifting from one jurisdiction to another. He prefers that the fundamental maxim of international law should be stated in terms such as these:—'Every legal relation ought to be determined according to the laws of the place in which it has become existent,'—the rule including, of course, the regard which ought to be had to laws which refuse to recognise any legal right not in conformity with their own provisions. The doctrine, though an improvement on the '*wort-klauberei*' of Zacharia, is by no means free from exception. It supplies a short and simple test for the validity of contracts and obligations; but its applicability to questions of status and capacity is not so clear. On this point we shall let our author speak for himself. He says:—

‘ Let us now apply this general maxim to individual relations.

‘ The status, and in general the legal capacity of a person, is to be determined by the laws of the place where he has his permanent residence (domicile); for it can scarcely be held, that status and capacity can become existent anywhere by a merely temporary residence. But what is true of status and capacity generally, cannot be absolutely said of one’s capacity for particular acts. As regards these, two matters have to be kept in view. In the first place, we must take into account the law in force in the place where the act or deed was done; for an act not in accordance therewith cannot be said to have ever legally existed. In the second place, when the acts of the subjects of one state come into controversy in their own domicile, the laws there in force are obviously still obligatory on them, so far as they profess to regulate the relations which these parties hold to their own country. But for laws of this last description, no general criterion can be laid down.’—(P. 40.)

As was said by Lord Brougham (in *Warrender v. Warrender*, 2 Cl. and Fin.), ‘ the general principle is denied by no one, that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts.’ And so it is universally held, with respect to the form and solemnities attending the celebration of, for example, the contract of marriage. But the nicer question is, Whether the courts of a country, the laws of which forbid a marriage within certain degrees, are bound to recognise it when celebrated in a place where such marriages are lawful; *e.g.*, an uncle and niece marrying in Spain or Portugal, under papal dispensation. On this point Dr Schaeffner says, ‘ A marriage forbidden between persons in their own country, is not rendered valid by being celebrated in a foreign country where such unions are lawful. On the other hand, it is undoubtedly valid in the place of its celebration. But what as to third states? We think that here too it is also valid, even in states in which it is expressly prohibited; for this prohibition can apply only to subjects of this third state, or at the utmost, to such marriages as are contracted in *territorio*.’ Our readers will hesitate to concur in a doctrine of such a startling character; and, indeed, no one can read the recent cases of *Brook v. Brook*, and *Fenton v. Livingstone*, without seeing that it is quite untenable.

A very interesting portion of this book is that which deals with the question of legitimation *per subsequens matrimonium*. This law is in force in the Channel Islands, Lower Canada, St Lucia, Trinidad, Demerara, Berbice, the Cape, Ceylon, Mauritius; in North America,—the States of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio; as well as in Scotland. In Ireland, England, the West Indian Islands, and the States of North America not

named, it is not received. What, then, is the governing law in questions as to the legitimation of a child by the after-marriage of its parents? The law of the place where the marriage was gone into—of the parents' domicile at the time of the marriage—of their domicile at the birth of the child—the law of the child's birth—or of the country where the lands lie to which the child, if legitimated, will succeed?

Dr Schaeffner rejects the law of the parents' domicile, because 'otherwise they would have the option, by the capricious selection of a domicile, to deprive the child of its capacity for legitimation. It may be answered, no doubt, that the parents are equally entitled to omit the celebration of marriage altogether. The *argumentum a majori ad minus* can scarcely, however, be here applied, because such a child from the moment of its birth holds certain legal relations towards its parents, according to which either the possibility or impossibility of legitimation by subsequent marriage must be settled. This possibility or impossibility depends principally on the existence of the child itself; and therefore in this, as in every other legal relation, we must look at the beginning, that is, in the case stated, at the child's birth. Therefore it is the law of the child's birth-place which must decide whether it is capable of legitimation by the subsequent marriage of its parents.' In support of this view he cites a French case mentioned in Burge, and which will be found stated in a note in 1 Rob. p. 587—the case of the *Count de Quesnay*, and the case of *Rose v. Ross*, 4 W. and S. 289. But in the more recent cases of *Munro* and *Macdowall*, 1 Rob. App., it was, after much discussion, finally settled by the House of Lords, that the governing law in such cases was the law of the father's domicile. A very full examination of the whole subject will be found in our third volume, p. 312; and therefore we do not care to show the fallacy of our author's opinion. The rule in this country, now finally established, is clear and easy of application. The place of the child's birth and of the domicile of the mother prior to the marriage is immaterial; the question depends on the domicile of the husband at the time of the marriage. If his domicile is in one of the countries recognising this mode of removing the stain of illegitimacy, it is immaterial where the marriage takes place, because the father's domicile being, *e.g.*, Scotch, the marriage is likewise Scotch as to all its incidents and consequences.

We wish we could have followed our author through his chap-

ter on contracts and obligations, but our limited space forbids any further extension of this article. We cannot conclude, however, without heartily joining in his repudiation of that curious and utterly unfounded doctrine, the *comitas gentium*, which flits about the pages of Story like a myth, and occasionally turns up in current reports in a manner most unexpected and uncalled for. What is the exact meaning of the expression, what the principle on which it rests, and the precise limits of its operation, has nowhere been satisfactorily explained. The word *comitas* means 'affability, gentleness, courtesy, civility.' What is the civility of laws? and what extraordinary consequences would follow, were everything left to the courtesy of the judges by whom they are administered? Dr Schaeffner thinks that the jurist who discovered the principle must have been some transcendental poet, the brilliancy of whose fancy was far in excess of his other powers.

'This extraordinary idea,' he says, 'of the *comitas gentium* has arisen from entirely confused notions of the nature of laws; resembling a *blocus hermetique*, it haunted many of the older jurists, and in modern times is chiefly found in Story. When it is seen to what this principle would lead, one is astonished that in no one case has it ever properly presented itself for application; at least, in most cases of the kind, reliance was placed on something quite different from *comitas*. How is it possible, with such an endlessly vague, unjudicial idea, to attain to anything like rational results? It will not in the remotest manner assist us in the determination of the simplest case of international law. Where is the beginning of this *comitas*, and where its end? How can we settle legal questions by political considerations, which are the most variable in the world?'

The style of this extract will show the tone in which Dr Schaeffner writes, and which, we think, is the best feature in his excellent little book. His views have been formed with a proper independence, and expressed with an amount of spirit which we hope the new Professor of Public Law will be careful to imitate; for we cannot help thinking that international law, as is said of religious and moral truth in a recent famous Oxford publication, 'is peculiarly one of those subjects liable to suffer by the repetition of conventional language, and from traditional methods of treatment,'—and requiring, therefore, 'a free handling, in a becoming spirit,' by every one who would place its doctrines on a firmer and more satisfactory basis.

NOTES IN THE INNER HOUSE.

FIRST DIVISION.

*Advocation.—Whyte v. Gerrard.**Competency of Advocation. Form of Summons of Removing in the Sheriff Court.*

Two points of considerable importance in the construction of the Sheriff Court Act of 1853 (16 and 17 Vict., cap. 80) were decided in this case. Whyte, the principal tenant of a farm in Banffshire, with consent of his landlord, brought a removing in the Sheriff Court of that county against his sub-tenant, Gerrard. The summons contained a statement of facts preceding the conclusions for removing, setting out the sub-tack, of thirty-two years' endurance, between Whyte and Gerrard, that the subjects let were of less value than L.25 a-year, and that the rents were two years in arrear. The defender pleaded that the summons-should be dismissed, in respect it was disconform to the schedule (A.) appended to the statute (16 and 17 Vict., cap. 80), which did not permit of any substantive statement of facts being embodied in the summons. The Sheriff, reversing the judgment of the Sheriff-substitute, gave effect to the plea, and dismissed the action. Whyte having presented a note of advocation, Gerrard maintained that it was incompetent, on the ground that the Sheriff's judgment was neither an interlocutor 'sisting process,' 'giving interim decree for payment of money,' nor 'disposing of the whole merits of the cause,'—these being the only interlocutors which the 24th section of the Act permits to be taken to review. One point, therefore, raised in the case, related to the competency of the summons, and the other to the competency of the advocation. It will be convenient to consider these points in the reverse order to that in which we have above stated them.

The first question is, whether the Sheriff's judgment, dismissing the summons on the ground of disconformity to the statutory schedule, was an 'interlocutor disposing of the whole merits of the cause?' If it was not so, it was not denied that it was not subject to review under the 24th section. The grounds on which the respondent mainly relied in objecting to the competency of the advocation were, *first*, that the Sheriff's judgment, dismissing the action on a point of form, would not be *res judicata* between the parties, as the pursuer might bring another action in competent form, and therefore could

not be held as disposing of the whole merits of the cause ; and, *secondly*, that the policy of the Act was to limit the power of review of the Court of Session, and that the Legislature having furnished a statutory form of summons, the Sheriff's function was little more than ministerial, and so necessarily final, in deciding whether any particular summons was informal or not. The consideration as to whether the judgment would be *res judicata* is obviously not decisive of the question in the defender's favour ; for, while in one view the judgment would not be *res judicata*, in another it certainly would. There can be no doubt that, had the pursuer raised another summons in the same form as the one dismissed, the Sheriff would have held, and rightly, that his previous judgment on the point of form was *res judicata* between the parties, and dismissed the second summons without more ado. As to the policy of the Act, we must admit that we are always very doubtful of an argument derived from this source, especially in the construction of a process statute. Its employment is almost tantamount to an admission that the words of the statute will not support the contention of the person adducing it. But if appeal is to be made to the policy of the Act, it strikes us that its support will be given, not to the incompetency, but to the competency, of the advocacy. How could it be the policy of the statute to sanction such a result as that which the Lord President pointed out, viz., 'that a Sheriff, by throwing out or dismissing such a cause "on the ground of informality," would put an end to the matter in such a manner that it could not be reviewed before himself ; and if the right of review were excluded, the merits of the cause could not be reached at all, and justice would be denied to parties ?' Again, we would say, if the policy of the Act is to be looked to, it was obviously this, in regard to causes above L.25, to prohibit the review by advocacy of interlocutors pronounced in the course of the cause, leaving them all to be reviewed together when the cause was finally disposed of. But who can doubt that the action of removing in the present case was finally disposed of, when the pursuer was turned out of Court by the Sheriff in the way we have mentioned ? Lord Deas put it very strongly when he said—'I think, in the sense of this statute, "the whole merits of the cause" just mean the whole cause. The Sheriff has undoubtedly disposed of the whole of this cause, and therefore I conceive the advocacy is competent.' The suggestion that the Legislature, in providing the Sheriffs with so plain a guide to walk by in judging

of the forms of summons as is supplied by the schedule (A.), had thought it unnecessary to allow their judgments on the point to be subject to review, is rather a humorous one, but it does not much advance the defender's cause. Upon the whole, there can be no reasonable doubt that the Court acted rightly in sustaining the competency of the advocacy. Whenever, therefore, a Sheriff dismisses a summons on a point of form, his judgment may be submitted to the review of the Court of Session, if the cause is above the value of L.25.

The other question, in regard to the proper form of a summons of removing, was the natural fruit of the clumsy manner in which the Sheriff Court Act of 1853 is drawn. The first section of the statute provides that, in all cases in the Sheriff Court, except those provided for by the Small Debt Act (1 Vict., c. 41), 'the summons shall be in the form, as nearly as may be, of the schedule (A.) annexed to this Act.' Nothing could be more general than the language employed; and unquestionably, had the matter stood there, the summons in the present case would have been in violation of the statute, for schedule (A.) contains no statement of facts whatever. But then, in the first place, the schedule begins with the words, 'petitory summons,' while an action of removing is, as Lord Curriehill pointed out, not a petitory, but a possessory and rescissory one,—a decree under it being declared to have the same effect as a decree of irritancy *ob non solutum canonem*. Then, again, the twenty-ninth and following sections of the Act, which relate to proceedings in actions of removing, commence with the following words:—'And with respect to actions of removing before the Sheriff Court, be it enacted as follows.' Effect has before now been given to such words in a statute, as showing that what preceded did not affect the matters introduced by them. It would, however, have been very difficult for the Court to allow such considerations as these to have taken actions of removing out of the operation of the first section. The thirty-second section, however, may be said to set the matter at rest; for, in conferring on the superiors of small feus, and landlords who have granted leases for a longer endurance than twenty-one years, the right of raising before the Sheriff actions of removing of their vassals or tenants who are two years in arrear, it provides that, in an action at the instance of a superior, the summons shall set 'forth that the subject is of the value'—less than L.25 a-year, 'and that the feu-duty has run in arrear as aforesaid.' This would

seem, certainly, to render it necessary that the summons should contain a statement of facts, at all events, to the extent pointed out by the statute. The Court accordingly reversed the judgment of the Sheriff, and held that, not only was the statement of facts embodied in it no ground for dismissing the summons, but that without such statement it would not have been in proper form. Lord Deas was of opinion that, even assuming that the summons had contained statements not required by the statute, the introduction of them would not have vitiated and destroyed it; but that it would have been proper for the Sheriff, if he thought them irregular, to have ordered them to be struck out. His Lordship said:—‘The Act of Parliament with reference to the schedule is merely directory, and though there had been an irregularity greater than is here alleged, it would not have followed that the summons was to be thrown out of Court. We see greater irregularities in this Court every day.’ The particular reference here made was to the irregularity, which was at one time very common, of introducing into the conclusions of ordinary petitory summonses in the Court of Session any statement or reference to the grounds of action, except where they are laid on liquid documents of debt. The Court of Session Act, 13 and 14 Vict., cap. 36, sec. 1, expressly prohibits such statement, and the schedule annexed permits only of the exception just mentioned. Nevertheless, it has been very common to introduce into the conclusions of the summons a long reference to the ground of action, —for instance, how the damage complained of arose. A better and safer practice is beginning to prevail, and not too soon; for there has been more than one indication from the Court lately, that the irregularity has been noticed, and, if continued, may be made the subject of judicial observation.

SECOND DIVISION.

Magistrates of Elgin v. Robertson and Others.

Right of Public Way—Expenses of Jury Trial.

THE object of this action was to have it found and declared that there exists a public right of way for foot passengers along the right bank of the river Lossie, upon the defenders’ lands of North College and Blackfriars’ Haugh, situated in the vicinity of the town of Elgin. After a lengthened trial, a jury, at last autumn sittings, returned a

verdict for the pursuers. The issue put to the jury was, Whether there had been uninterrupted use by the public, as a footpath, for forty years, or for time immemorial prior to 1840 or 1845? In the evidence laid before the jury there was clear proof of interruption at and before 1835, continued down to 1845. From 1835 up to 1829 there had at least been no peaceable and uninterrupted use. The remotest date to which the pursuers' evidence of use went back was 1798 as to North College lands, and 1802 as to Blackfriars' Haugh; while it was proved, by evidence consistent and uncontradicted, that prior to 1798 no right of footpath had been enjoyed. The longest period of possession proved, from 1798 to 1835, fell short, therefore, of forty years, and (even assuming it to have been uninterrupted) was insufficient to establish the pursuers' right. Acting upon this view of the case, the judges of the Second Division granted the motion for a new trial, on the ground that there was no evidence to support the verdict. In the case of *Harvie v. Rodgers* (8 July 1828, 3 W. and S. 251), where it appeared, by the evidence of living witnesses, that so far back as 1755, seventy years previous to the time of trial, the way was used without interruption; and there was no evidence of any interruption of the right occurring until the year 1789, thirty-four years subsequent to the beginning of the period to which the evidence related,—the Lord Commissioner directed the jury that the right must 'be presumed to have been established by having been used for forty years and upwards from the date of the interruption.' This direction was approved of by the Court of Session, and by the House of Lords on appeal,—the Lord Chancellor laying it down as law, that the evidence being carried back as far as seventy years—as far back as the memory of any witness could extend who was examined upon the trial—as far as it was probable the recollection of any witness could apply to a case of this description, and thirty-four years of uninterrupted exercise of the right of way being established,—it was competent for the jury to presume, and they ought in point of law to be directed by the judge to presume, from thirty-four years' exercise of a right of way uninterrupted, a previous enjoyment corresponding with the manner in which it had been enjoyed during the thirty-four years. This doctrine was recognised as law, and confirmed in the subsequent case of *Cuthbertson v. Young*, 20 Dec. 1851 (14 Dun., p. 300). The pursuers in the Elgin case contended that this presumption of possession *retro* applied in the state of the evidence in

that case, the actual proof of possession going as far back as thirty-seven years. The Court, however, held that there was no room for such a presumption where there was evidence of possession adverse to the right of way prior to the date up to which the proof of possession reached, and that proof of possession for less than forty years, bounded on the one side by ancient possession adverse, and on the other side by modern possession adverse, was not sufficient in law to establish a public right of way. This doctrine had been laid down by the presiding judge (the Lord Justice-Clerk) in his charge to the jury, but seems to have been disregarded by them in their short-sighted zeal for the interests of the public, who have reason for congratulation that in cases such as this, where a verdict is returned flagrantly opposed to the evidence, the Court holds some check upon the popular sympathies of the jury. The doctrine of *Rodgers v. Harvey*, that where uninterrupted possession is proved as far back as human memory can extend, possession for full forty years is to be presumed, must be taken under this limitation, that such a period of possession is actually proved as will reasonably lead to such a presumption.

It is undoubted law, that if a right of public way be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in ; but if interruptions (although not acquiesced in) have extended from the date of the action over a period nearly as far back as the memory of man extends, it can hardly be contended that proof of uninterrupted enjoyment for the few years prior to the date at which the interruptions commenced, would be sufficient to establish a right of public way. There seems to be an absence of authority as to the length of established possession which is requisite to raise the presumption. The time requisite would probably, within certain limits, vary with the circumstances of each particular case.

In granting a new trial in the Elgin case, the Court, after a full discussion, reserved determination as to the expenses of the previous trial till the ultimate issue of the cause. The early cases seem to countenance the doctrine that, as an absolute rule, the party asking a new trial must pay the expenses of the previous trial. It was contended by the pursuers, that this, although not now an absolute rule, was still the general rule, more especially in cases where the verdict was set aside, not on legal grounds, but simply as contrary to evidence. The Lord Justice-Clerk put the

matter on this sound and satisfactory basis, that the question, whether the expenses of the first trial should be reserved, was in every case an appeal to the discretion of the Court to determine what course was most in consonance with equity in that case. The tendency of the Court has been, lately, rather to reserve than to give at once the expenses of the previous trial; and this course seems to recommend itself on the grounds of expediency and justice. It is difficult to conceive why the party eventually successful, and who must be held to have been in the right throughout, should not be entitled to the expense of maintaining his rights in a previous trial, in which, either from the misdirection of the judge or the miscarriage of the jury, he was unsuccessful. But whatever be the result of a new trial, the Court run no risk of doing injustice by reserving the expenses of the previous one till the ultimate decision of the case, and are then in a much better position for determining by whom, or in what proportions, these expenses should be paid. Any hardship that the successful party is subjected to by having to disburse the expense of a new trial, without security for the expenses of the first, might be obviated by requiring the party seeking a new trial to find caution for previous expenses.

DEFECTS IN THE LAW OF EVIDENCE.

PROOF OF BIRTH.

As we intimated last month, it is probable that some further relaxation of the exclusionary rules of evidence will be submitted to Parliament in the ensuing session, chiefly with reference to divorce and consistorial practice. Advantage should be taken of the opportunity which the contemplated measure affords, to obtain the repeal of a very objectionable rule of evidence, peculiar, we believe, to the law of Scotland, according to which, 'in all civil questions where the rights of husband and wife depend on the birth of a living child, it is presumed *juris et de jure* that it did not live, if it was not heard to cry.'—(Dickson on Evidence, sec. 295.) In other words, the only proof of the fact of a child having been born alive, is that it was heard to cry,—a principle, the operation of which has been extended now to ordinary cases of succession, by the decision in the case of *Robertson v. The General Assembly*, 22 January 1833, 11 D. 297.

How this principle came first to be introduced into the law of this country, appears to be a matter of considerable doubt. If it be true, as Mr Robertson has, we think, established (Robertson on Personal Succession, p. 16 *et seq.*), that the *Regiam Majestatem* was compiled in a great measure from the English work of Glanvil, then it would seem that the principle was imported from the English law, which at one time corresponded entirely to ours in this respect ; —and imported, too, letter for letter and word for word, without, apparently, the slightest attempt to conceal the plagiarism ; for the words of the *Regiam Majestatem* on this subject are neither more nor less than an exact and faithful translation of the passage occurring in Glanvil. This fact, at all events, affords proof that either the *Regiam Majestatem* was compiled from Glanvil, or Glanvil from the *Regiam Majestatem*. A collation of the two passages shows the truth of this assertion :—

Glanvil, c. vii., sec. 18.

‘Cum quis itaque terram aliquam cum uxore sua in maritadium cepit, si ex eadem uxore sua heredem habuerit, filium vel filiam clamantem et auditum infra quatuor parietes, si idem vir uxorem suam supervixerit, sive vixerit hæres sive non, illi in vita sua remanet maritadium.’

Regiam Majestatem, L. ii. c. 58, sec. 1.

‘Quhan ane man receaves with his wife (being ane heretrix) land in name of maritage, and begets upon her ane heire, sonne or dochter, heard cryand and greitand, within foure walles of the house, and the wife happen to deceis before the man, suppose the bairne live or deceis, the land and heritage quhilk pertained to the wife sall remain and be possessed be the husband induring his lifetime.’

What the reason or object was of this limitation of the proof to the fact of crying *within the four walls of a house*, does not clearly appear ; at all events, these last words may now safely be regarded as surplusage, because, as was argued in the case of *Dobie (infra)*, a child may by chance be born in the fields. Usage having already so far modified the rule laid down in the *Regiam Majestatem*, and reason demanding it, we see no reason why the precedent should not have been followed, and a further modification made. Skene (*De Verb. sig. voce Curialitas*) again states the doctrine as laid down in the *Regiam Majestatem*, and adds the following quaint remarks on the subject :—‘The curtesie has nocht place quhen na bairne is born in lauchfull mariage, for it is necessar that ane bairne be borne maill or femaill, quick and liveand ; and for probation theirow he mon be heard cryand, for the curtesie his place in *puero clamante*, (or, as it is written in sum buikes) brayand, squeiland, or loudlie cryand. For in French *brayer*, in the Latin *vagire*, is to crie or greite with

ane loud voice. Quhilk word in our language is alswa attributed to horse, hartes, and other beastes ; and gif controversie arise anent the life or crying of the bairne, it is leisum to the father to prufe the samin be twa lauchfull men or women, quha hearde the bairne *clamare, plorare, vagire seu brayare.*'

The rule having been so clearly stated in the *Regiam Majestatem*, and explained by Skene, has remained as part and parcel of our law even to the present day, and is to be found as such in the works of all our institutional and other writers. (See Craig, 2. 22. 40 ; Stair, 1. 4. 19 ; Erskine, 1. 6. 40 ; Balfour's Practicks, p. 100 ; Bankton, 2. 6. 19 ; Fraser, vol. i., p. 636.) But, while stating the law as they found it, more than one of these authorities have openly expressed their disapproval of it. Thus Bankton (*ubi supra*) : 'It is generally thought that in our law the child must be heard cry, that being the surest evidence of life ; but *I cannot see why other evidence of life may not be admitted.*' And Erskine also (1. 6. 40) censures the limitation of the *modus probandi* in terms somewhat severe. Lord Stair seems to be the first of our writers who has ever attempted to give any tangible reason or excuse for the doctrine as existing : 'The reason why the child must be heard cry is to make certain its living ripeness, and not leave it to the conjecture of the witnesses' (1. 4. 19).

Now, although at the period at which the *Regiam Majestatem* was compiled the law of the sister kingdom coincided with ours in this respect, yet a very slight examination of the English authorities will suffice to show that this was not long so. The soundness of the doctrine in question appears to have been so early as the time of Lord Littleton a matter of much doubt ; for that learned writer, after stating his own view, proceeds to give that of others in these words (ch. 4, § 35) : 'Et aucuns ont dit que il ne serra tenant per le curtesie, si non que l'enfant qu'il ad per sa feme soit oye crie, car per le crie est prove que l'enfant fuit nee vife.' But, at all events, by the time Coke wrote his Commentary there can be no doubt that the old doctrine had completely exploded, and the *modus probandi* much extended. 'If,' says Lord Coke, 'it be born *alive*, it is sufficient, *though it be not heard cry*, for peradventure it may be born dumb ; . . . the crying is but a proof that the child was born alive, and so is *motion, stirring, and the like.*'—(Co., Litt., 9th edn., p. 30.) Blackstone also, in his Commentaries, speaks very decidedly on the subject to the same effect as Coke : 'Some have a notion

that it must be heard cry, but that is a mistake. Crying, indeed, is the strongest evidence of its being born alive, but it is not the *only* evidence' (vol. 2, p. 127).

Thus, while this antiquated principle, originally adopted from the jurisprudence of England and engrafted into that of ours, has long since been expunged from the jurisprudence of the former, the Supreme Court of Scotland has still stubbornly persisted in its recognition; and, instead of modifying or controlling its operation, the tendency has rather been to extend it beyond its original bounds, and to make it apply to *all* civil questions, after the limitation of the right of courtesy to which the doctrine was properly applicable has been swept from the statute-book.

The case of *Dobie v. Richardson* (M. 6183) appears to be the first reported case in which the Court was called on to apply the principle, as laid down in the *Regiam Majestatem*, and copied by subsequent writers; and the rubric of the case is certainly calculated to startle the modern reader somewhat. It goes on to say: 'not sufficient that a child be born alive (!), unless it also be heard to cry.' In this case the child actually breathed, raised one eyelid, and expired, as the report has it, 'with the usual convulsive agonies,' about half an hour after its birth, but was not heard to cry. But a stronger and still more interesting case is that of *Robertson v. The General Assembly*, 22 Jan. 1833, 11 D. 297. Here there was no question between husband and wife, but the case was one of ordinary succession under a will; and although the child was born alive, and continued to live three-quarters of an hour, and was perceived to breathe repeatedly, and its heart distinctly felt to beat, yet the Court held that an averment to that effect was not relevant to infer that the child was a living child. It was in vain argued in this case, that although the rule is laid down in the institutional writers *quoad* courtesy, or questions between husband and wife, it should not be extended to other cases, even supposing that the doctrine of the *Regiam Majestatem* would then still hold. The soundness of this decision, it is proper to remark, is questioned by Mr Dickson (Dickson on Evidence, sec. 295); and we must now wait for the recurrence of another decided case to which the same principle would be applicable, ere the law of Scotland, in regard to this matter, can possibly be said to rest on a sure and satisfactory footing. As it stands at present, it appears uncertain in no small degree. The rule has certainly outlived the reason for its adoption. It is easy to suppose

that, in earlier times, when medical science had not reached anything like the height of perfection it has now attained, the crying of a child was naturally thought by our wary forbears to be the safest, if not the only satisfactory proof that it came alive into the world; and hence the existing criterion. But surely this reasoning is not *now* receivable. 'Evidence of life,' as a certain annotator on Glanvil remarks, 'may as well be furnished by a thousand other circumstances.'—(*Vide* Beame's Glanvil, p. 193.) To establish this, it is only necessary to refer to any work on medical jurisprudence. Why should not *breathing*, it may well be asked, be considered a proof as conclusive of life as crying? for breathing constitutes the surest possible test of life; and the fact of a child having breathed can be determined beyond the possibility of doubt by *post-mortem* examination of the circulating system, and of the respiratory and abdominal organs; while, on the other hand, crying is by no means a necessary consequence of life in a child. In cases of child murder, for example, it is sufficient to show that the child breathed. Why follow a different rule in civil matters?

But even breathing is not a necessary attendant of life in a child. 'It may be born, the cord may be pulsating, showing that it is alive, and yet it may not respire.'—(Beck's Medical Jurisprudence, p. 268, 7th edn.) The same authority tells us that the child may live in this state for a sufficient length of time to die from natural causes, or, it may be, from violence.

In Robertson's case, there was not only the fact of breathing,—conclusive, rationally, in itself,—but there was also the fact that circulation of the blood had commenced, for the child's heart was 'felt distinctly to beat;' and yet in the eye of the law the child was regarded as a dead child.

It may, however, be urged that there would be danger in extending the *modus probandi* so as to admit evidence of breathing, when established only by *post-mortem* examination, as sufficient to establish that a child was actually born alive, in respect that some medical authorities contend that a child may be heard to cry while *in utero*, and yet may be born dead. But Dr Beck (p. 309) specially grapples with this very objection, and completely overthrows it. For, while he openly states his entire disbelief in any of the recorded instances of this premature crying, and calls it a 'physical impossibility,' he deals with these recorded instances, and, after much reasoning, draws the following conclusions:—

(1.) That respiration anterior to full birth is a rare occurrence ; (2.) That, when it does take place, it must be under circumstances which give the child the best possible chance of being born alive ; (3.) That, when a child dies in this situation, the respiration must necessarily be *imperfect*, and therefore it can create no difficulty in cases where the evidences of perfect respiration are present ; (4.) That, when a child dies in this situation, the respiration must, as a matter of course, be of short duration, and therefore it can present no difficulty in cases where, from the appearance of the umbilical cord, it is evident that respiration has been continued for some time. (P. 312.)

Further comment on the present state of the law seems unnecessary. If the *modus probandi* is extended in criminal cases, that seems sufficient to warrant a similar extension in civil matters. It is, at least, difficult to conceive any satisfactory reason why the same test should not be applied in all cases.

England and Scotland are the only countries in the world which ever at any period required a proof of crying as necessary to establish the fact that a child was born alive. Such a doctrine was unknown to the Roman law, and is unheard of in the jurisprudence of any country but Scotland at the present day. The sister kingdom, centuries ago, saw its error, and obeyed the dictates of reason ; but Scotland still holds out against the unanimous and unequivocal voice of the most eminent physiologists in maintaining a principle, whose only claim to regard is its antiquity, and which is directly opposed to all reason and common sense.

THE MONTH.

Resignation of Lord Wood.—This event did not take either the profession or the public by surprise, as the state of health of the learned judge was such as to make his resignation a mere question of time. Lord Wood has, for the long period of twenty years, faithfully, conscientiously, and ably filled the onerous post of judge in the Outer and Inner House ; and his keen intellect and discriminating mind will be missed by the suitors before the Court, as much as the absence of so esteemed a brother must be regretted by his col-

leagues. He succeeded Lord Gillies—that is to say, was elevated to the Bench on the retirement of that eminent judge—without having filled either of the high Crown offices. He had for some considerable time been Sheriff or Steward of the stewartry of Kirkcudbright. His popularity as a Lord Ordinary was very great, and he must have felt, very shortly after his elevation, what it is said more than one besides his Lordship have felt since their appointment,—that the advocate who accepts of a judgeship in order to escape the toils of a large practice at the bar, may find himself mistaken in his estimate of the judge's duties. The result not unfrequently is, an increase of work with a very considerable decrease of emolument. However, there can be no more honourable post than that of a Senator of the College of Justice; and whoever worthily discharges his duty in such a sphere, is certain of retaining when he retires, if not the courtesy title by which he was known as a judge,—what is much better, and more worth living for,—the respect and unaffected esteem of his countrymen.

While we write, it may be assumed as certain that Mr Macfarlane is to be promoted to the judicial seat, the Solicitor-General being unwilling to leave his practice, and the possible career which undoubtedly lies before him, should the Lord Advocate at some early period quit the post which he so ably fills. No one can be surprised at the decision of the Solicitor-General, however much we may regret, for the sake of the public, that one so eminently qualified should not at present consent to occupy the Bench. Within the last few years, the Solicitor has exhibited a very marked talent for public speaking, of a kind which we believe would not be unacceptable in the House of Commons, if he should obtain the chance of filling the first Crown Office in Scotland. Mr Maitland having declined, there could be no good reason why Mr Macfarlane should not in turn obtain the offer of the seat. No one on the Conservative side has anything like his claims, even if there had been any kind of obligation on the Lord Advocate to tender such an office to the opposition, which at present there is not. The three last appointed judges were Conservatives; and so far as any claim of that kind may be supposed to exist, it is that the Lord Advocate shall not, on this occasion, overlook his own political friends. Mr Macfarlane has been long known as one of our most extensively employed pleaders, having won his way upwards by dint of arduous and assiduous labour. His knowledge of law must, in the very

nature of things, be extensive and accurate; indeed, we know no pleader at the bar better informed on the actual state of the law. His experience for several years as Sheriff of the important county of Renfrew, is an additional qualification for the office of judge in the Supreme Courts.

Assuming that Mr Macfarlane will be promoted, it will leave the Sheriffship of Renfrew to be disposed of. In the ordinary case, the senior Depute has the best claim; but there are various considerations which, in the present instance, have led to the selection of Mr Patrick Fraser in place of Mr Heriot. The former, although never a Depute, has been longer in the service of the Crown as counsel for the Inland Revenue Department; and his position at the bar would, to a certain extent, preclude him from accepting of the junior Deputeship with a view to future promotion. There can be no question as to the services Mr Fraser has rendered to the profession, not only by his admirable work on the Domestic Relations, but by his numerous and valuable papers upon different branches of the law, his late pamphlet upon the Divorce question being only one of many similar beneficial efforts. No better proof of the estimation in which Mr Fraser's legal learning is held by his brethren could be given, than the very general feeling which prevailed among them when the chair of Scots Law was vacant, that if Mr Fraser had come forward as a candidate, they would have supported him in place of any of the others. It would have been unfair to overlook an able and most industrious lawyer, because in the circle of inferior Crown appointments he held one which precluded him from rising to the position of senior Depute by rotation. While approving of the appointment of Mr Fraser, it is not to be understood that we mean one single word in disparagement of Mr Heriot, whose high character and amiability, conjoined with his legal acquirements, would have made him very acceptable to the county.

It is scarcely necessary to speak of any remaining change which Mr Macfarlane's elevation may create, as the recent junior appointments have been so entirely unobjectionable, that the fair inference is, the same course will be adhered to. Notwithstanding certain rumours to the contrary, we presume the gentleman selected will be of some considerable number of years' standing. The appointment will also, we assume, be given on no other than the ground of merit and fair professional position, which, after all, is the true secret for keeping a party intact and powerful. It would be very Utopian to urge

that such appointments should be made without reference to party ; but so long as the present system exists, the selections ought to be made upon some recognised principle as little offensive as possible.

Sheriff Courts.—We give elsewhere a letter, from a valued correspondent, on the important question of the abolition of double Sheriffships, and the increase of the salaries of the Sheriff-substitutes, so as to place them, in point of social status and position, on a par with the County Court judges of England. No question can be more important than those discussed in the letter, both for the public and the profession. We lean undoubtedly to the opinion expressed as to the double Sheriffships seriously affecting the amount of business in the Court of Session ; and so affecting it, not because litigants are satisfied with the judgment of the Sheriff-depute, but because they become sick of expense and delay before the cause is in a position to be advocated. Other causes operate in the same direction, such as the decision of the Auditor, not to allow the necessary charges of the country agent as a portion of the judicial expenses, and the consequent loss to a litigant, whether he gain or lose his plea. It is clearly our interest to have all such barriers removed, with the view of adding to the miserable show of business which is making so many consider gravely what is to be the future position of the Court of Session. Equally, however, we regard it as the business of the public more than ourselves to agitate against the double Sheriffships. The office of Sheriff-depute serves many excellent purposes, and is not so utterly indefensible as our correspondent assumes, although we are inclined to believe that the benefits accruing from it do not balance the evils which it undoubtedly entails. The benefits to which we point are not those of enabling the Lord Advocate to govern Scotland, as it is alleged was the reason given for the continued maintenance of the office, when its necessity was seriously questioned some years back. Scotland, we believe, would go on equally well without any ‘government’ of the kind indicated ; and we believe also, that both the prosperity and prestige of the Scotch bar would survive the abolition. If our correspondent’s view be a true one, that the existence of the office is a direct hindrance to cases coming up to the Supreme Court, leaving both the Court with diminished business, and litigants disgusted with the legal machinery of the country, it cannot be the interest of any branch of the profession to prevent its suppression. Those who

would, in the usual course, have looked forward to such an office, would be compensated by an additional share of professional work, and many able and excellent men saved from being *shelved* at a period of life when their faculties are at the best. We cannot envy the lot of a counsel, who, having obtained his appointment as Sheriff-depute, finds that, while he has got a post not over-lucrative, he gradually drops out of professional employment, and is left for the remainder of his career to eat his heart in enforced idleness. Of course we cannot, on the other hand, discuss those cases where a barrister thus attains to a better position than either his abilities or professional standing entitled him to expect; for that would be to assume that there are such cases, and we do not wish for a moment to be supposed to insinuate that there are. There are usually two ways in which the profession may view such projected changes: one, that the abolition may appear to be only an apparent loss, with, in the end, a real and substantial gain; another and a narrower view, that it would be a positive and irreparable loss, which no additional business to be obtained in consequence of the abolition could ever repair. The public will judge of the question from an entirely different point of view. They will only consider the question in its relation to speedy and cheap justice; and when it is taken up by the community in this serious light, we trust that no professional prejudices will prevent us discussing it fairly and calmly, solely with a view to the public benefit.

Correspondence.

SHERIFF COURTS.

To the Editor of the Journal of Jurisprudence.

SIR,—Mr Buchanan, one of the members for Glasgow, in addressing his constituents on the evening of the 10th January, dropped the following crumb of comfort to that deserving class of officials, the Sheriff-substitutes, who think themselves so ill-used compared with their brethren the judges of the English County Courts:—

‘I am aware that the increased range of jurisdiction in our local Courts, however beneficial to the public, imposes additional labour on the Sheriffs. The truth is, that Scotland is unfairly dealt with as to the services and remuneration of these officers. The County Court judges in England, none of whom have so much business as some of our own Sheriffs, receive salaries varying in amount from L.1000 to L.1500 per annum. There can be no reason why, on this side of the Tweed, the same work, or

rather much more work, should be compensated with L.500 to L.1000. If the Lord Advocate shall take up this subject of Sheriff Court reform, I hope he will not overlook this necessary part of it. The expense of an increase of salary might be supplied by a change, which I believe the country would approve of,—doing away with the office of the Sheriff principals or deputes, after the death of the present holders of office. By such a course the dignity of the local judges would be advanced, their emoluments improved, and a right of appeal to the Sheriffs principal, which is practically a mere delay and obstruction of the course of a suit, would be done away with. I would also remark that, under any change of system, it would be an advantage to vest in the Crown the patronage now exercised by the Sheriffs-depute, of appointing their own substitutes.'

It cannot be denied that Mr Buchanan has here touched a chord in unison with the tone of popular feeling on this question. The dexterity of the Lord Advocate saved the double sheriffship in 1853; more, however, from the ignorance of the members of the House of Commons of Scottish institutions, than from any merit in the cause itself; and when once the subject comes to be properly understood, it will be quite impossible to justify the existing arrangement. The maintenance of the double office was for some time treated as a so-called Edinburgh question, and as one of the proper privileges of the Scottish bar. This might be, were the appointments the reward of professional merit, instead of political subserviency, which notoriously they are. But the class benefited is so exceedingly select in its character, the appointments so few and far between, that, apart altogether from public considerations, many are beginning to feel that the interests of the profession are rather in favour of than against the change proposed. It cannot be doubted that the necessity of allowing every inferior court process, after being disposed of by the Sheriff-substitute, to lie on the table of the Sheriff in Edinburgh for a year or eighteen months, is a serious obstacle in the way of preventing much valuable and important business, which would otherwise, naturally and inevitably, flow into the Supreme Court. Every one is perfectly satisfied with the very expeditious way in which the judgments of the Sheriff-substitute come up for review, direct to the Inner House, in bankruptcy cases, under the Act of 1856; and if justice can thus be well administered in such an important branch of the law, it is difficult to see the use of *two* judgments in the inferior court in other cases, especially as under existing arrangements the opinion of the Sheriff cannot be obtained without a great deal of money, and the loss of much valuable time. It is held, I believe, that there is no incompetency in advocating the judgment of the Sheriff-substitute direct; but this is not the interest of the party found to be in the wrong. On the contrary, it is always his wish to obtain as much delay as possible; and the law says he may have it, whatever be the injustice inflicted on the party holding the decision of the inferior court in his favour. Cheap and ready access to the Supreme Court would do away with this, and at the same time prove the most effective safeguard against any caprice or tyranny to which the local judges may otherwise be liable. The present system is nothing else than employing two men to do what is properly only one man's work. When, in 1846, the English lawyers were establishing their County Courts on the

model of our Sheriff Courts, they did not borrow this feature of our system, because they could not be made to understand it. They are, however, beginning now to see through it. They are saying, If the Sheriff is fit for his work, why should he be permitted to do the duty by deputy? or, at all events, if it is to be done by deputy, why should the suitor be compelled to take, not the deputy's opinion only, but the opinion of the Sheriff as well? and if the substitute is qualified, what purpose is served by his having a superior in Edinburgh, when the Court of Session is so accessible as a court of review? To this argument I do not well see the answer. Again, many persons, like Mr Buchanan, are at a loss to understand why so important an office as that of resident Sheriff should be filled on the nomination of a private individual. The patronage certainly ought to be given to a Minister of the Crown, who would be responsible in Parliament for any abuse of its exercise. The case for the change proposed is also much strengthened by the fact that Sheriff-substitutes, as a class, are now, on the whole, very capable men; and if it is for the public advantage that the efficiency of the Sheriff Courts should be further increased, no consideration ought to interfere with the office of judge being made as attractive as possible, both in point of status and employment, so that the country, instead of having, as in former times, to put up with the services of those who have *failed* at the bar, may secure those who, for their years and standing, have attained comparative success.

But whether so radical a change in the constitution of the Sheriff Courts is for the present attempted or not, I hope that next session will see the accomplishment of a reform which for some years you have constantly advocated; I mean the proposal to extend the summary procedure of the Small Debt Court to all cases under £25, with an appeal on a case stated to the Court of Session or Circuit Court on questions of law. The greater one's experience of the working of an appeal on a case stated, the more thoroughly am I satisfied of its practicability. Already it is in actual operation, under a number of statutes, with complete success. In particular, I may refer to the very satisfactory way in which the many nice questions arising under the Valuation Acts, as administered by the Commissioners of Supply, are submitted to review. The 20 and 21 Vict., cap. 58, entitled a party dissatisfied with the determination of the Commissioners, 'to require the said Commissioners or magistrates to state specially, and to sign, the case on which the question arose, together with the determination thereupon, and to transmit such case to the Commissioners of Inland Revenue, to the end that the same may be remitted to the senior Lord Ordinary and the Lord Ordinary officiating in Exchequer causes in the Court of Session, for their opinion thereon; and such judges to whom such case may be submitted shall with all convenient speed give and subscribe their opinion thereon; and according to such opinion, the valuation or assessment which shall have been the cause of such appeal shall be altered or confirmed.' In this manner, during the four years this statute has been in operation, the opinion of the judges has been given on from thirty to forty cases, which have been printed for official use, and which form a valuable body of law relating to the valuation of lands and heritages.—I am, etc.,

A LAW REFORMER.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

BEATTIE v. M'KAY AND OTHERS.—Jan. 9.

Reduction—Contract.

Mr Beattie, Inspector of the Barony Parish, Glasgow, sues for reduction of a deed of agreement entered into between the defender, M'Kay, late Governor of the Barony Poorhouse, and the other defenders, Paterson, Fulton, etc., acting as a quorum of the House Committee of the Parochial Board. The ground of reduction is, that they contracted with M'Kay without authority; but the pursuer proposed to put in issue whether particular clauses of the agreement only were unauthorized, thus intending to let the agreement stand as a whole while reducing it in part. The Lord Ordinary (Kinloch) reported the case, with a note, adopting the views of the defenders, that the whole agreement must be put in issue. This view the Court, after hearing counsel for the pursuer, unanimously confirmed, without calling on opposite counsel, finding the defenders entitled to expenses.

Adv., AFFLECK v. AFFLECK.—Jan. 14.

Fraud—Reparation—Interdict.

William Affleck, of Linkens, in the stewartry of Kirkcudbright, in the year 1852, granted a lease to his oldest daughter of the lands of Linkens, extending to about 300 acres, at a rent of L.50 per annum. At the same time he signed an agreement of sale of the stock and crop of the farm for the price of L.40. Thereafter, in the year 1854, he executed a disposition in favour of his said daughter of the lands in question, and Miss Affleck was afterwards infeft as proprietrix of said lands. William Affleck, the father, is an old man of upwards of eighty years of age; and he alleges that, when the deeds so granted by him were executed, he was of a weak and facile disposition, and easily imposed upon, and that these deeds were impetrated from him by his daughter, Miss Affleck, through fraud and circumvention. He has brought an action of reduction of the deeds accordingly. Miss Affleck, on the other hand, maintains that these deeds were granted by her father for a good and sufficient cause, and while he was perfectly able to grant such deeds; that she being the only one of the family capable of managing the farm, her father often proposed to let it to her; that the farm is entered in the valuation roll at L.70 a year; that it is burdened with an heritable debt, the interest of which is L.25; that the disposition is granted to her under burden of an annuity of L.15 each to her brother and sister; and that thus there remains to her only L.15 a year, less taxes and public burdens. In this state of matters, and just before the action of reduction was brought, William

Affleck presented a petition to the Sheriff for interdict against his daughter selling or interfering with the stock and crop on the farm, and the appointment of an interim manager thereof, until the action of reduction which he then contemplated raising was disposed of. The Sheriff granted interdict, and appointed a manager accordingly, and then sisted process to await the issue of the reduction. An advocacy of this interlocutor was brought by Miss Affleck. She contended that the application to the Sheriff was incompetent, and also that interdict ought not to be granted, on the ground that she had been for several years in the peaceable possession of the lands, and of the stock and crop thereon. The Court were of opinion that the Sheriff's interlocutor, sisting process until the issue of the action of reduction, could not be maintained in its entirety. But it being stated at the bar that the action of reduction was now ripe for trial, issues having been adjusted and notice of trial given, they thought it more expedient for all parties not to dispose of this advocacy in the meantime, and therefore superseded consideration of the case *hoc statu*, and reserved all questions of expenses.

MAIR v. INGLIS.—*Jan. 18.*

Extract—Proof of Tenor.

Hugh Mair, bootmaker, Glasgow, obtained a verdict for damages against W. Inglis, printer there, and desired to extract decree for the said damages. The extractor refused to grant extract, because the principal summons was not produced to him. It appears that the principal summons is lost, and the pursuer moved the Court for authority to hold the copy of the summons, which had been in process all the time, equivalent to the principal. To this the defender refused to consent, and the Court held that, consent being refused, it would be dangerous to allow the copy to be used instead of the principal, and that it would be necessary to prove the tenor of the lost summons.

J. AND C. GARDNER v. ANDERSON.—*Jan. 21.*

Partnership—New Trial.

The pursuers are merchants in Belfast, and they furnished to Anderson, Crichton, and Co., commission agents, Manchester, a quantity of starch, for the price of which they sued James Anderson, merchant, Miller Street, Glasgow. They obtained a verdict, by 11 to 1, against him, on the ground that he held himself out, or allowed himself when held out, to be a partner of that firm, and that they furnished the starch believing him to be a partner. He moved for a rule to show cause why the verdict should not be set aside, and the Court unanimously refused it, the Lord President remarking that the evidence that he held himself out as a partner was very delicate, but that he had not taken proper precautions to warn the pursuers that his connection with the firm which changed itself into Anderson, Crichton, and Co. had terminated, but left them still entitled to believe that he was a partner of that firm.

BELL AND OTHERS v. REID AND OTHERS.—*Jan. 22.*

Right of Way—New Trial.

This is an action brought by certain inhabitants of the village of

Eaglesfield, for the purpose of having it declared that there exists a public footpath from Eaglesfield to the town of Lockerbie, in Dumfriesshire, which footroad the pursuers allege passes over the defenders' lands of Cushethill. The case was tried before the Lord President and a jury in the month of July last, on the following issue :—'Whether, for forty years and upwards, or for time immemorial, prior to the 2d day of February 1860, there has existed a public footroad or right of way for foot-passengers leading northwards from the village of Eaglesfield to' the various points marked on a plan in process, 'and from thence leading to the village of Tundergarth and town of Lockerbie?' The jury returned a verdict for the pursuers. The defenders moved for a rule upon the pursuers, to show cause why the verdict should not be set aside, on three grounds, viz. :—1st, In respect the pursuers had not adduced evidence of the alleged footpath being a public right of way between the two public places mentioned in the issue—viz., the village of Eaglesfield and the town of Lockerbie—sufficient in law to warrant the verdict; that the pursuers had failed to prove a public road from one terminus to the other; and that the evidence applied only to a small portion at one end of the road. 2d, Because any evidence that was adduced of persons passing over the defenders' lands was not evidence of that kind of use sufficient to establish a public right of way; that it was the evidence merely of cottars and neighbours passing over the defenders' lands, not from one public place to another, but from their own houses, going generally to their work on the defenders' and neighbouring farms. And 3d, Because the pursuers had failed to prove continued and uninterrupted possession of the road for forty years. The Court, after hearing the defenders' counsel on all these grounds, granted the rule.

SECOND DIVISION.

Susp. and Lib., WILSON v. STRONACH.—Jan. 9.

Diligence—Bill of Exchange.

The complainer was incarcerated on a warrant to imprison granted upon an expired charge given upon a protested bill. The warrant is for payment of a sum of L.325 and interest, under deduction of a sum of L.99, and the debt for which the complainer was booked in the prison books at the time of his incarceration was for that amount. As admitted by the respondent, a further sum of L.13 had been paid by the complainer, for which no credit was given or deduction made. The defence upon which the respondent relied was, that he rectified the error by lodging with the keeper of the prison a new and corrected state, crediting the omitted sum, and by writing to the keeper the withdrawal of the first state; that he substituted a correct state; and that the keeper consequently booked the complainer for the restricted sum. Intimations to a like effect were stated to have been made to the agents for the complainer. The complainer having presented a note of suspension and liberation, the Lord Ordinary (Jerviswoode) passed the note, and granted warrant for the liberation of the complainer, on the ground that he had been imprisoned on a warrant,

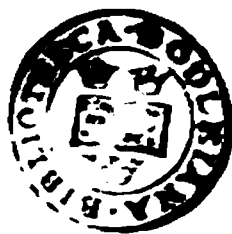
the direct object of which was to enforce payment of a sum which was in excess of what was truly due to the respondent. His Lordship held that the restriction, as respected the amount of the debt, did not avoid or meet the difficulty arising from the fact that the warrant on which the complainer was apprehended and committed was a warrant obtained for the enforcement of the larger sum, and that that warrant had neither been competently restricted nor withdrawn.

The Court, on the same ground of the illegality of the warrant, adhered to the Lord Ordinary's interlocutor in so far as it granted liberation, but limited the suspension to the excess above the true amount of the debt due by the complainer.

Pet. for Recal of Seq., BRANDON AND MANDY. v. STEPHENS.—Jan. 9.

Recal of Sequestration—Act 22 and 23 Vict., cap. 33.

This is a petition for recal of a sequestration, under the Bankruptcy (Scotland) Amendment Act, 1860 (22 and 23 Vict., cap. 33). The petition for sequestration was presented on 5th February 1861, at the instance of the bankrupt, 'William Henry Stephens, newspaper proprietor, formerly residing at Upper Belgrave Place, in the county of Middlesex, and now residing at Dunoon, in the county of Argyle, with concurrence of Andrew Rutherglen, accountant in Glasgow.' The Lord Ordinary granted sequestration, and remitted to the Sheriff of Argyle. At the first meeting of creditors, at which were present only Mr Rutherglen for himself, and as mandatory for another creditor, and two other persons, one of whom was an hotel-keeper at Inverary, as mandatories for two other alleged creditors, Mr Rutherglen was appointed trustee. In his statutory examination, the bankrupt, examined by the Sheriff-substitute, deponed, 'I was born in England, and was never in Scotland till about the 23d December last, but I have lived in Argyleshire uninterruptedly since then. I have no property of any description in Scotland, excepting, of course, my clothes, and a little money for current expenses. I have two creditors in Scotland,—Mr Andrew Rutherglen, my trustee, to whom I owe L.175, and Mr Middleton, to whom I owe L.75. I left England in consequence of my present embarrassment, and because warrants were out for my apprehension. I came to Scotland for sequestration, partly in order to avoid exposure in London, and partly because I understood that the matter could be carried through more cheaply in Scotland; and this was of importance to me, as my father had refused to make any advances for the purpose unless I came to this country.' 'The debt due to Mr Rutherglen is the probable amount of his bill of costs for expense and trouble in sifting the partnership affairs.' 'I was recommended to come to the county of Argyle, in particular, because I was not well, and because it was a quiet place, where unnecessary publicity would be avoided.' The bankrupt was discharged on 17th September 1861, on the usual report by the trustee, and his certificate that thirteen creditors had ranked their claims on the sequestrated estate, and eleven of them concurred in his application for discharge, and that the amount in value was L.3055, 11s. 9d., and that the value of the two non-concurring creditors' claims was L.150, 4s. The present petition for recal was presented on 8th April 1861, and the record was not closed till October. The Lord Ordinary



(Jerviswoode) refused the petition for recal; but the Court altered, and recalled the sequestration.

The Lord Justice-Clerk expressed his satisfaction that the Act of 23 and 24 Vict., cap. 33, had been passed. *Prima facie*, the present was a strong case for recal, and it seemed most expedient that the bankrupt's estate should be distributed among his creditors, according to the law of England. The bankrupt was an Englishman who had no connection with Scotland, and whose creditors, with trifling exceptions (if any), were English, whose estate (if any) was in England, and whose avowed object in coming to Scotland was to obtain sequestration. The Lord Ordinary seemed to have been moved by the undue delay in proceeding with the petition for recal, and by the fact that the bankrupt had been discharged; but he (the Lord Justice-Clerk), although he did not approve of the delay, was not much affected by it, as this was a sequestration devised and intended, in its origin and whole object, not for the benefit of creditors or for the distribution of the bankrupt's estate, but for the benefit of the bankrupt alone, its sole object being to obtain his discharge.

WINTON AND CO. v. R. THOMSON AND CO.—Jan. 17.

Proof of Tenor—Trust for Creditors.

This is a suspension of a charge on a bill, on the ground that it was granted to one M'Intosh, as the price of his assent to a composition contract by the creditors of Winton and Co. M'Intosh endorsed it R. Thomson and Co., of Manchester; and Winton and Co., the acceptors, allege that Thomson and Co. were in league with M'Intosh, and that the endorsement was merely to carry out the alleged fraudulent preference. Thomson and Co. deny all knowledge or connection with the composition contract, and maintain their privileges of *bond fide* onerous indorsees. The alleged composition contract is not produced, and is said to be lost. The suspenders claimed a proof of its tenor *incidenter* in this suspension, which the Court some time ago allowed, and appointed a minute to be lodged, setting forth the tenor of the agreements, the *casus amissionis*, and the adminicles. Such a minute being given, the chargers took objection to the adminicles, in so far as they not only had no tendency to prove the writing, but had a decided tendency the other way. The alleged agreement was to accept a composition of 5s. in the pound, payable by two instalments at three and six months from 1st February 1857; whereas the bills, letters, and receipts produced as adminicles, showed that the creditors were paid at totally different dates, and that there had been no regular complex deed, but in reality a scramble among the creditors, each one taking what he could get.

The Court repelled the objection, and sustained the adminicles, holding that, although they might appear inconsistent, they clearly bore reference to a composition contract, and the inconsistencies might be explained away by the parole proof. The Lord Justice-Clerk was not prepared to say that a proof should not have been allowed, even had there been no adminicles produced at all; but, at all events, those before the Court had manifestly reference to the substantial matter in dispute, namely, whether there was a composition contract among the creditors. The Court, therefore, pronounced the usual interlocutor, sustaining the adminicles, and allowing a proof of the tenor and *casus amissionis*.

MAGISTRATES OF ELGIN *v.* ROBERTSON AND OTHERS.—*Jan. 17.**Right of Way—New Trial.*

The present action was raised in November 1860, by the pursuers, against James Robertson, the proprietor of the lands of North College, and Alexander Robertson, the manager of his affairs, and two tenants of part of the subjects, and against William Grigor, the proprietor of the lands of Blackfriars' Haugh; the object of the action being to have it found and declared that there exists a public right of way for foot-passengers along the right bank of the river Lossie upon these properties. Both lands are situated in the immediate vicinity of the town of Elgin.

The case was tried by a jury at the autumn sittings, who returned a verdict for the pursuers. Counsel were some time ago heard on the motion for a new trial, which the Court now granted.

The opinion of Lord Wood (in which the other judges concurred) was read by the Lord Justice-Clerk, and is to the following effect:—Before granting a new trial, the Court should be convinced, either that the verdict has no evidence at all to support it, or is contrary to the evidence in this sense, that there cannot be found in it any reasonable support for the verdict,—that it is palpably, or, as it is called, flagrantly, opposed to the evidence. The issue that was tried in the present case was, whether there had been uninterrupted use as a footpath for forty years, or for time immemorial, prior to 1840 or 1845. In answer to that issue, it would be sufficient for the pursuer (if interruption previous to that date were instructed by the defender) to make out forty years' uninterrupted possession, beginning at a date prior to 1840. In the evidence laid before the jury, there was clear proof of interruption at and before 1835, continued down to 1845, and (it must be presumed) that interruption was continued to the present time. From 1835, up to 1829, there had at least been no peaceable and uninterrupted use. The remotest dates to which the pursuers' evidence of use went back, was 1798 as to North College lands, and 1802 as to Blackfriars' Haugh; and even assuming that the possession had been uninterrupted from the earliest of these dates down till 1829 or 1835, in the one view a period of only thirty-one years, in the other a period of only thirty-seven years, the period proved would fall short of forty years' possession, which was requisite to establish the pursuers' right. The presumption that possession existed prior to the date up to which the memory of witnesses went, which was given effect to by the House of Lords in the case of *Rogers v. Harvey*, did not apply to this case. There the evidence of possession went back for thirty-four years, as far back as the memory of the oldest witness, and there was no evidence as to the possession prior. Here there was no room for such a presumption; the proof of the state of possession prior to 1798 was entirely adverse to the pursuers' case, and in support of it there was no evidence. There was no conflict of proof, as it had been proved by evidence consistent and uncontradicted, that prior to 1798 no right of footpath was used or enjoyed along the lands either of North College or Blackfriars' Haugh. In whatever point of view the case was presented, the verdict could not be allowed to stand as finally settling the rights of parties, and the rule for a new trial must therefore be made absolute. Expenses reserved.

OUTER HOUSE.

M. P., BROAD v. EDGAR AND OTHERS.—Jan. 16.

Representation—Intestate Succession Act.

An important, and, we believe, the first, case under the Act of Parliament 18 Vict., c. 23, sec. 1, generally known as the Intestate Succession Act, has just been decided by Lord Neaves. The point at issue was the manner of distributing the moveable estate of Miss Janet Irvine, who died intestate, leaving no relations nearer than cousins-german. The question was brought up in the form of a multiplepinding, in which there were two sets of claimants,—one claiming at common law as nearest of kin, and the others maintaining a right under the Act of Parliament, which introduces the doctrine of representation in moveable succession, whereby children of predeceasing next of kin are entitled to represent their parents. The first claimants were children of the deceased sisters of the deceased father of the intestate, and, consequently, first cousins. The second were grandchildren of deceased sisters of the intestate, their parents having predeceased the intestate, and therefore second cousins. From the annexed interlocutor and note of the Lord Ordinary, it will be observed that his Lordship has preferred the former, holding that the principle of representation of the Act of Parliament, as maintained by some of the claimants, does not apply:—

‘Edinburgh, 14th January 1862.

‘The Lord Ordinary having heard parties’ procurators, and considered the closed record and whole process, ranks and prefers the six claimants, Michael Broad, *alias* Brodie, William Broad, *alias* Brodie, William Broad, *alias* Brodie, William Ormiston, Margaret Milles or Finney, and her husband for his interest, Mrs Jean Johnstone or Edgar, and Mrs Jean Caruthers or Beattie, to the whole fund *in medio*, in terms of their claim, No. 11 of process: Repels the claims of the whole of the other claimants, and decerns: Finds the said six claimants before named entitled to expenses: Allows an account thereof to be given in, and remits the same, when lodged, to the auditor, to tax and to report.

(Signed) ‘CHARLES NEAVES.’

Note.—The six claimants preferred by the prefixed interlocutor are undoubtedly the parties entitled to the whole succession in dispute, unless their rights are diminished by the recent statute, 18 Vict., c. 23. They are the cousins-german of the defunct, who left no other relations nearer or equally near in degree.

The claims of the other competing claimants are founded on that statute, by which, to a certain extent, representation in moveables is introduced into the law of Scotland.

By the first section of the Act, the general principle of representation is established, but it is qualified by the following provision:—‘Provided always that no representation shall be admitted among collaterals after brothers’ and sisters’ descendants.’

The question at issue between the parties regards the construction of this provision. But the Lord Ordinary has not been able to see that its construction is attended with any difficulty.

The representation introduced by the statute, which obviously infers merely the substitution of a child or descendant for its parent in the matter of succession, and has no relation to liability or passive title, may arise among descendants of the intestate, or it may arise among collaterals. Among descendants it is unlimited. When an intestate leaves child, or children, and leaves also grandchildren, or great-grandchildren, of a predeceasing child, the remotest descendants take the succession *jure representationis* along with the nearest.

But among collaterals the representation is not unlimited. It holds clearly to the full extent in the case of all the descendants of the brothers and sisters of the intestate. If the intestate leaves a brother or sister, and leaves also nephews and nieces by a predeceasing brother or sister, the representation holds. In the same way, if he leaves nephews or nieces, and grand-nephews or grand-nieces, the child in every such case comes in place of its predeceasing parent.

But the representation is expressly excluded among collaterals 'after brothers' and sisters' descendants;' that is, as the Lord Ordinary understands it, there is no representation where the competition arises among collateral relations of the intestate more remote than his brothers' and sisters' descendants.

In the present case, the intestate left no brother or sister, and no descendant of a brother or sister. The competition arises between cousins-german and the descendants of cousins-german. This is a question among collaterals *after*—i.e., more remote than brothers' and sisters' descendants—and, therefore, representation is not admitted.

As the question seems to the Lord Ordinary to be clear, he has found the successful claimants entitled to expenses.

(Initialed) C. N.

HIGH COURT OF JUSTICIARY.

HER MAJESTY'S ADVOCATE v. M'PHERSON AND OTHERS.—*Jan. 13.*

(Before the LORD JUSTICE-CLERK and Lords ARDMILLAN and NEAVES.)

Jane M'Pherson or Dempster, Catherine Stewart, William Thwaites, and Jessie Clark or Anderson, were tried for the theft of L.74 from the person of an English gentleman (who had drunk five tumblers of toddy), aggravated by previous conviction. The previous conviction charged against Thwaites was one at the Quarter Sessions of Berwick-upon-Tweed.

Conviction objected to, on the ground of international law, that the courts of one country can take no cognizance of the penal laws of another.

The Court, by a majority, repelled the objection.

Lord Ardmillan: Theft was a crime against the public law of the United Kingdom; it was a crime against the law of England as well as of Scotland, and the Queen's courts of both countries had jurisdiction to try persons accused of that crime. The case was not the same as if the conviction had passed before a foreign tribunal—French, Belgian, or German. This was not a conviction before a tribunal having that species of foreign character, because it was a conviction before one of the courts of the Sovereign of this kingdom. If, therefore, there was a common quality in the offence which made it cognizable in all the Queen's courts, if theft meant the same thing in England as in Scotland, he could see no

sound objection to proving a conviction in one of the Queen's courts before another of these courts, as showing the quality attached to the actor in the crime.

Lord Neaves said that, after every consideration he was able to give to the matter, he had come to the conclusion that the evidence was not admissible, and that the objection ought to be sustained. It could not admit of doubt that an English sentence of any kind was not *probatio probata* in this country—no more than any other sentence of any other foreign country. It was admitted by the Solicitor-General that it would not be competent in this case to inquire whether, in regard to this previous conviction, the man had been justly or fairly tried, or whether he was not totally innocent. His Lordship doubted whether the sentence of a foreign court was a conviction in the sense of the law of Scotland—where there was only a sentence pronounced, which might or might not be a just sentence. He took also this separate and additional ground of objection to this evidence, that, although there might be a general resemblance between theft and what was called larceny in England, he could not overlook the fact that very different views of theft were taken in different countries. What is regarded as theft in one country might not be considered theft in another. There were several things that might be theft in Scotland under local statute that was not theft in England, and *vice versa*, and there were many nice questions as to what was theft and what was breach of trust; so that it was matter of uncertainty whether the crimes in the two countries were in substance the same.

The Lord Justice-Clerk: If this were the sentence of a foreign Court, in the strict sense of the word, there could be no doubt whatever as to what their deliverance should be. But the question was a very difficult one when they came to consider the constitution of this Court, and the foundation of their own jurisdiction, and their relation to the other courts of criminal jurisdiction in the United Kingdom. In the first place, it would be observed that all criminal as well as all civil jurisdiction between this United Kingdom flowed from one source—namely, from the Sovereign; in the second place, it must be observed that the sentence of all criminal courts in Scotland, England, and Ireland were put into execution by the same sovereign authority; and, in the third place, it must be observed that the prosecutor in this Court was the Queen herself, acting through her chief law officer. Now, it seemed to him that it would be somewhat anomalous if, when the public prosecutor, representing the Queen, made a charge of this kind, he should not be able to libel a previous conviction for the same offence from a competent court, deriving jurisdiction from the same authority. He could easily understand a case in which such previous conviction should not be admissible if the crime was not of the same quality in the two countries, but he did not think there was the slightest reason for supposing that there existed any essential difference between what constituted theft in the two countries; and he thought the Act 13 Geo. III. clearly showed that theft, in its definition, was the same in both countries. Now, that being the case, he was disposed to come to the conclusion, though he could not do so without hesitation, that they were bound to receive the evidence of this conviction as an aggravation of the offence charged against the prisoner. Verdict—Guilty, as libelled.

BEATTIE v. GEMMELL.—*Jan. 20.*

(Before the LORD JUSTICE-GENERAL, the LORD JUSTICE-CLERK, Lords IVORY, COWAN, ARDMILLAN, and NEAVES.)

Certification to Court of Session.

This case came on appeal from the Small Debt Court before the Circuit Court of Justiciary at Glasgow, and was certified to the High Court. The question was, whether the case, being purely civil, should have been certified to the High Court or to the Court of Session.

The Court, acting on a precedent cited, and no objection being offered, remitted the cause to the Second Division of the Court of Session.

Susp., MACDONALD v. YOUNG.—*Jan. 20.*

Civil or Criminal.

Macdonald, the Procurator-Fiscal for Airdrie, presented a petition to the Sheriff-substitute there against Young, a coalmaster, praying that a pecuniary penalty should be imposed, under the Act 23 and 24 Vict., c. 15, for breach of a regulation as to the ventilation of a mine. The clause of the Act upon which the petition was laid warrants only the infliction of a fine, and gives no authority to imprison, either as alternative or to enforce payment.

An appeal having been taken by Young to the Sheriff, he pronounced a judgment holding the appeal competent. The Fiscal brought a suspension of that judgment. The respondent objected to the suspension as incompetent, on the ground, *inter alia*, that the case being of a civil nature, could not be entertained by the Court of Justiciary.

The Lord Justice-Clerk held that the penalty imposed under the clause of the Act founded on was a forfeiture, intended to be recovered by summary action before the Justices or Sheriff; and that this being a purely civil matter, the Court of Justiciary had no jurisdiction.

The other Judges having concurred, the suspension was refused, with expenses.

English Cases.

CHARTER-PARTY—‘*Safe port*’—*Construction*.—A charter-party provided that the vessel chartered should proceed ‘to a safe port in Chili;’ the bills of lading stated that she was ‘bound for Valparaiso for orders,’ and she was ordered by the defendants ‘to proceed to Valparaiso, there to receive orders to a port of discharge in Chili, in accordance with the charter-party.’ On her arrival at Valparaiso, she received orders ‘to proceed to the port of Carrisal Bajo.’ Carrisal Bajo was a closed port, and any ship entering it without a permit from the Government would be confiscated. This permit could not be obtained. The port was by nature ‘a safe port,’ and the order given *bona fide*. At the time of the making of the charter-party neither the owners nor the charterers knew that any ports in Chili were closed. *Held*, by the Court of Q. B., that, under the above circumstances, Carrisal Bajo was not ‘a safe port’ within the meaning of the charter-party.—(*Ogden v. Graham and others*, 5 L. T. R. 396.)

GUARANTEE—Past or Future Consideration.—Plaintiffs, by the seventh count in their declaration, sued defendant 'for that in consideration the plaintiffs would sell and deliver from time to time goods to L. D., the defendant guaranteed and promised plaintiffs from time to time to be responsible to them for the due payment of the prices of the said goods.' Averments of supply of goods on credit to L. D. accordingly, that a large sum was due to plaintiffs from him on account thereof, and that all conditions, things and times necessary, etc., had been fulfilled, etc. Breach, nonpayment by either L. D. or defendant. Plea, 'That the said guarantee and promise in the said count mentioned were in writing, and in the words and figures following, that is to say: "Gentlemen,—As Mr D. informs me you require some person to act as guarantee for goods supplied to him by you in his business, I have no objection to act as such, and for payment of your account.—Yours, etc., H. T. Grace." And that, except as aforesaid, there was never any guarantee or promise by the defendant to the plaintiffs in respect of the matters in that count mentioned.' To this plea the plaintiffs demurred, on the ground that it set forth nothing in bar to the seventh count; the defendant, on the other hand, contended that the guarantee in terms referred to a past consideration only, and so was void. *Held*, that the guarantee ought to be read as meaning 'goods to be supplied,' and as referring to a future and not to a past consideration; and by the Court of Ex., That if it were ambiguous in its terms, then parol evidence would be admissible in explanation. Pollock, C. B.: Mercantile documents are not to be looked at as strictly as lawyers would read a marriage-settlement, but they should be read liberally as commercial men would read them, and, in construing them, all the surrounding circumstances are entitled to be had in evidence, to show their meaning.—(*Hoad and another v. Grace*, 5 L. T. R. 359.)

CARRIER—Railway.—B. verbally sold to C. by sample, on the 29th December, twenty-eight quarters of wheat, to be delivered at C.'s mill, and sent it to the appellants' station at Brackley for that purpose, paying the carriage of it to Birmingham, and an additional charge for its carriage by van to the mill, about two miles from the Birmingham station. The wheat was duly despatched, and arrived at the Birmingham station on 1st January. In consequence of C.'s want of room on his own premises, and in pursuance of general written instructions from C., the course of business between him and the appellants was for them not to forward any grain arriving at their station at Birmingham for him until they had advised him of its arrival, and had received his written order to forward it; but of this usage and course of business B. was ignorant. C. having been duly informed by the appellants of the arrival of the wheat, and that it remained at his risk, sent a clerk on the following day to the station, who took a sample from each of the sacks, and remarked that it was 'rather a roughish lot;' but he gave no order with regard to it. Nothing further was done by C., and the wheat remained at the station till the 4th March, without any charge being made by the appellants on C. for demurrage or warehousing, when B., finding that C. refused to take it, had it returned to himself. The wheat having been deteriorated in value by remaining so long at the station undried in sacks, B. sued the appellants in the County Court, as carriers, for damages incurred by the breach of their contract to deliver at the mill, when the judge directed the jury that the appellants were liable to B. for their omission to deliver at C.'s mill, and for damage arising from the deterioration of the wheat while in their custody, and that, as between B. and the appellants, there had been no delivery to the consignee so as to terminate their liability, and the jury found a verdict for B. for the full amount. The company appealed from this decision. *Held*, by the Court of Ex., that the judgment of the County Court judge, founded on the notion that the carrier was bound to deliver at the mill, notwithstanding the order of the consignee to the contrary, was wrong; that the holding the wheat at the station by the appellants, in conformity with the previous general instructions of the consignee, operated as a delivery to the consignee, and the appellants were not bound to

deliver at the mill. *Per Curiam*: If a consignor direct goods to be delivered by a carrier at a particular place, there is no contract to deliver at that place, and not elsewhere; the contract is to deliver at the place named by the consignor, unless the consignee shall direct otherwise. A consignee has the right to fix the place of delivery, and may at any time dispense with the contract to deliver at a particular place, by directing the delivery to be made elsewhere.—(*London and North-Western Railway Company (appellants) v. Bartlett (respondent)*, 5 L. T. R. 399.)

LANDS CLAUSES CONSOLIDATION ACT, 1845, SEC. 92—*Construction of—Obligation on Company to take the whole Land, and not a portion.*—A railway company required a portion of a landholder's property for the purposes of their railway, and gave him the usual notice to that effect. The landowner was willing to sell this portion, if the company would pay a sum of L.800 for it. The company considered this sum infinitely beyond its value, and proceeded to have a valuer appointed under the compulsory powers of the Lands Clauses Consolidation Act, and, having executed the usual bond, paid the valuer's estimate, L.150, into court. Before, however, the landholder was served with the bond, he made claim under the 92d section of the Act, that he required the company to take the whole of his property, and not the portion required by them. *Held*, that he might do so, and decree made that the company were bound to take the whole. *Wood, V.-C.*: On the construction of the 92d section of the Lands Clauses Consolidation Act, 1845, it would be most unreasonable to hold that the plaintiffs, by fixing L.800 as the price for the portion comprised in the notice to treat, had precluded themselves from requiring the company to take the whole. It might well be that a landholder might be willing to retain the remainder in his possession, if his price for the part were paid him. But when you begin to compel him to give up that part, it became a very different thing. The plaintiffs had shown no delay whatever, and might reasonably enough say, 'We ask a very large sum for the portion, because the severance will so greatly deteriorate our property as to the remainder, that if you decline to give us our price for the part, then we shall require you to take the whole.'—(*Gardner v. The Charing Cross Railway Company*, 5 L. T. R. 418.)

VENDOR AND PURCHASER—*Damages.*—The defendants' trustees, with power of sale of an estate in which A. had a life-interest, put the estate up for sale by auction, acting *bonâ fide*, and reasonably believing that A. would join in the conveyance to the purchaser. The plaintiff became the purchaser, and paid the deposit. Subsequently A. refused to join in the conveyance, whereupon the defendants offered to return the deposit, which the plaintiff refused, claiming compensation for the loss of the bargain. *Held* by the Court of Q.B. (Cockburn, C. J., *dissentiente*), that the plaintiff was not entitled to damages for the loss of the bargain, but only to the return of the deposit and costs of investigating the title.—(*Sikes v. Wild and others*, 5 L. T. R. 422.)

DAMAGES—*Master and Servant.*—The plaintiff was hired by the defendants to serve as a third engineer on board one of their vessels. On the voyage he was ordered by the first engineer to assist in working a winch, the handle of which, in the act of turning, flew off (owing to the negligence of the first engineer in not having it properly fastened), which caused the plaintiff to sustain serious injuries. In an action against the owner of the vessel for damages the plaintiff was nonsuited, on the ground that a master was not responsible for injury done by one servant to another in respect of the thing used or employed, unless there is a personal neglect traced to the master. *Williams, J.*: I am of opinion that this direction is right. There is no foundation for saying that Simpson (the chief engineer) and the plaintiff were not fellow-servants. The rule has been, and is now, part of the law, that the master is not liable for the negligence of one of his servants, by reason of which a fellow-servant sustains damage. Then it has been said that the conduct of the employers takes this case out of that rule; but, to make that out, there must be some evidence to

show that due care had not been exercised by the master in providing proper machinery and skilled workmen, but I see no evidence to that effect.—(*Searle v. Lindsay and others*, 5 L. T. R. 427.)

JOINT-ESTATE IN COAL-MINES UNDER TWO ESTATES HELD IN SEVERALTY—
Use of Shaft sunk in one of the Estates—Right to Participate in Profits.—Plaintiff and defendant, being each entitled in severalty in fee to one of two contiguous estates (excepting the coal-mines under such estates respectively), were also owners of the coal under both estates in undivided moieties as tenants in common. For the purpose of raising from under both estates the coal to which the plaintiff and defendant were entitled in common, a shaft was sunk in the defendant's estate, and was used for that purpose. Afterwards the same shaft was used for the purpose of raising through and by means of the same the coal belonging to adjoining proprietors. *Held* by Stuart, V. C., that the plaintiff was entitled to participate in the profits made by the use of the shaft in raising the adjoining coal, though the shaft was sunk in the defendant's estate.—(*Clegg v. Clegg*, 5 L. T. R. 441.)

MASTER AND SERVANT—Negligence.—The plaintiff, by the direction of his master, went with a cart to defendant's premises to receive a load of cotton; another cart was in course of loading, which belonged to defendant, and was in charge of one of his servants, who requested the plaintiff to help him to move the bales and to place them in his cart, which the plaintiff did; and whilst so occupied, a bale of cotton, which was being lowered by the defendant's servants, through their negligence fell and injured the plaintiff. There was no negligence on behalf of the plaintiff or of the defendant's carter. *Held* by the Ex. Ch. (affirming the judgment of the Court below), that the plaintiff could not maintain his action against the defendant for such injury.—(*Potter v. Faulkner*, 5 L. T. R. 455.)

WILL—Indemnity Clause.—Will of a testatrix, made in 1854, contained the following indemnity clause:—'And I declare that such trustee shall be answerable only for losses arising from his own defaults, and not for involuntary acts, or for the acts or defaults of his co-trustees or trustee, and particularly that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of my will, or for any definite purpose authorized by my will, shall not be obliged to see to the due application thereof, nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys; but this clause shall not restrict the power of any trustee to require from his co-trustee an account of the application of moneys in his hands, or to insist on his replacing moneys misapplied by him.' There were three trustees of the will who joined in signing and giving receipts for money received from two insurance offices. One of the trustees, with the consent of his co-trustees, was allowed to retain the amount on the representation that he would deposit it at a bank until an eligible investment could be found. He, however, misappropriated the amount. On bill filed seeking to make the co-trustees liable, *held* by Lord Westbury, C. (affirming the decision of Stuart, V. C.), that the co-trustees were protected by the indemnity clause contained in the will. If one trustee were so to act as to cause the inference that he knew of an intended or contemplated breach of trust, no indemnity clause would avail to protect him from liability.—(*Wilkins v. Hogg*, 5 L. T. R. 467.)

COPYRIGHT.—An assignment of copyright made before the statute 5 and 6 Vict., c. 45, must be attested by two witnesses. Martin, B.: In the case of *Davidson v. Bohn* (6 Com. B. Rep. 456) it is clearly laid down on the construction of the statute 8 Ann, c. 19, that there must be a writing attested by two witnesses. It seems to me that the whole of the judges in the House of Lords adopted the same view; that they say the matter had been too long decided to be overruled by any new construction to be put on the Act; and that the judges are bound to act upon it.—(*Cumberland v. Copeland*, 31 L. J., Ex. 19.)

TRUST AND TRUSTEE.—An appointment of new trustees of a chapel cannot be made with a view of subverting the trusts declared by the deed of foundation or of ousting the *cestuis que trust* from possession of the estate. Where, therefore, trustees have been appointed of a Baptist chapel for the purpose of obtaining possession for the benefit of a seceding congregation, the new trustees must re-convey the chapel to trustees to be appointed by the *cestuis que trust*.—(*Newsome v. Flowers*, 31 L. J., Ch. Ca. 29.)

WINDING-UP.—The holder of a large number of shares in a joint-stock company, for which he had executed the deed, transferred them, in consideration of a small sum of money, to his bailiff (Crocker), a man without property, and who earned wages of a guinea a week. The consideration-money was not paid. The company was ordered to be wound up, and the name of the transferee was placed upon the list of contributories; but upon appeal, the Master of the Rolls ordered the name to be removed, and that of the original holder of the shares to be placed thereon, his Honour considering the transaction to be merely colourable; and the Lords Justices affirmed the decision. Turner, L. J.: I think it clear, as between the appellant and Crocker, that the transfer was a mere colourable transaction; and the evidence satisfies me that Crocker was a mere instrument of the appellant, attempted to be made use of by him as a shield against the company's claims on him. As to the right of the appellant to make the transfer, it may be admitted that he had a right to transfer to whomsoever he pleased, even to a beggar; but his right to do so could not give validity to the transfer if it was fraudulent.—(*Ex parte Budd, in re the Electric Telegraph Co. of Ireland*, 31 L. J., Ch. Ca. 4.)

SPECIFIC PERFORMANCE.—It is against public policy to compromise a suit for a divorce; and the Court of Chancery will not entertain a bill for specific performance of a contract founded on such compromise. Wood, V. C.: This Court could not be made ancillary to any proceeding by which the plaintiff would be enabled to pocket the price of his own shame. It must be assumed against the plaintiff that he did not proceed with his suit in the Divorce Court because he did not feel confident of the result; for though he stated in the bill that he could have proved the adultery, he could not say that he would have obtained a divorce.—(*Gipps v. Hume*, 31 L. J., Ch. Ca. 37.)

DESERTION.—A. married a woman, and, after cohabiting with her at her father's house for some weeks, left her. At his request she shortly afterwards went to him, and remained with him for two or three days. He then sent her back to her father, saying that he could not support her. After the lapse of eighteen months, during which she did not hear from him, he went to her father's house, and asked to be allowed to see her. Her father refused to allow him to have any communication with her until he should be in a condition to support her. He then left, and never returned, or asked her to return to him. *Quære*, whether these facts established a case of desertion. Sir C. Cresswell: If there had been a clear case of desertion previous to the respondent's interview with his wife's father, the case might have assumed a different aspect; but as it stands, I entertain great doubts.—(*Harris v. Harris*, 31 L. J., Pr. & Mat. 6.)

ARBITRATION.—After an arbitrator had made his award, one of the parties discovered that the award had been drawn up by the person who had acted as attorney and advocate for the other party in the reference, and that this person had also advised the arbitrator privately in the matter of the award. This was admitted by the arbitrator; but he positively denied that he had done more than consult the attorney, who was his own ordinary professional adviser, as to the form of the award, or that his decision was in any way influenced thereby. Under these circumstances, the affidavits in exculpation of the arbitrator being very strong, the Court refused to set aside the award. Erle, C. J.: I express the trust that such a proceeding will not hereafter be resorted to, for it is open to all the imputations and all the perils to the award which have been pressed upon us; but in the present instance we do not feel ourselves justified in saying

that the award should be set aside.—(*In re Underwood and the Bedford and Cambridge Rail. Co.*, 31 L. J., C. P. 10.)

ALIMONY.—The rule of the Ecclesiastical Courts as to the amount of permanent alimony awarded to a wife who had obtained a divorce *à mensâ et thoro*, furnishes no guide for the exercise of the discretion of the Court in determining what provision should be made by a husband for a wife who has obtained a decree of dissolution of marriage. Sir C. Cresswell: The principles by which the Court of Divorce and Matrimonial Causes will be guided in exercising that discretion are, that the wife having by her husband's misconduct been deprived of her position, she ought not to purchase redress at the cost of being left destitute; that it would be impolitic to give a wife any great pecuniary interest in obtaining a dissolution of the marriage tie; and that such provision should be payable only so long as the wife remains chaste and unmarried.—(*Fisher v. Fisher*, 31 L. J., Pr. & Mat. 1.)

NEGLIGENCE.—On the trial of an action against a railway company for an injury to plaintiff's property, caused by the emission of sparks from one of the company's locomotive engines, owing to the negligence of the company, the judge, after telling the jury that the evidence for the company was extremely powerful to show that the engine was of the best known construction, but that the evidence of plaintiff's witnesses was that in their opinion the risk of causing mischief by sparks from the engine in question was not improbable, and that the engine was so constructed as to be dangerous without precaution of some kind, left it to the jury to decide whether any other precaution could be reasonably required from the company. Direction sustained. Erle, C. J.: As it appears to us that there was a conflict of testimony upon a question of degree, which was necessarily for the jury, to which the learned judge left all the questions raised before him with clear discrimination and sound judgment, the rule must be refused.—(*Freemantle v. London and N.-W. Ry. Co.*, 31 L. J., C. P. 12.)

CHARTER-PARTY.—A charter-party contained the usual clause—'To be loaded with usual despatch.' In consequence of a sudden frost, the loading of the plaintiff's vessel with coal was delayed for 34 days. It was proved that, if loaded with usual despatch, it would have taken five days, being at the rate of 20 tons a day. The Court sustained a direction to the jury, to the effect that the circumstance of the navigation of the canal, by which the coal should have arrived, having been stopped by the frost, and the defendant thereby prevented from completing the cargo at the rate of 20 tons a day, was no answer to the action.—(*Keason v. Pearson*, 2 Nov. 1861, 31 L. J., Ex. 1.)

SALE.—Defendant, a hop-merchant, entered into a contract with plaintiff, who was a hop-grower, for the purchase of hops by sample. Inasmuch as defendant could not sell hops to his customers if sulphur had been used in their growth, he inquired of plaintiff, at the time of making such contract, if sulphur had been so used, and plaintiff stated that it had not, and thereupon the contract was made. Plaintiff knew of the objection by hop-merchants to sulphured hops, and defendant would not have bought the hops if he had been aware that sulphur had, in fact, been used. It was held, the contract was conditional on sulphur not having been used in the growth of the hops; and that if sulphur had been so used, defendant was at liberty to reject the hops, although they corresponded with the sample by which they had been sold. Erle, C. J.: The understanding that no sulphur had been used was a preliminary stipulation, and if it had not been given the defendant would not have gone on with the treaty which resulted in the sale. It would be contrary to the intention expressed by the stipulation, that the contract should remain valid if sulphur had been used. If the parties so intend, the sale may either be absolute, with a warranty super-added, or the sale may be conditional, to be null if the warranty is broken; and upon this statement of facts the intention appears to have been that the sale should be null if sulphur had been used.—(*Bannerman v. White*, 31 L. J., C. P. 28.)

EASEMENT.—The warehouse of plaintiffs, which had ancient windows, having been burnt down, was rebuilt by them. In the new warehouse the windows were placed in different situations, were of different sizes, and altogether occupied more space than the windows of the old building. Some parts of some of the new windows coincided with some parts of the old; but a greater portion of the old and new windows did not coincide. Defendants, who had premises on the other side of the street, raised their house, and so obstructed the access of light to the new windows. They could not have obstructed the passage of light to such portions of the windows as were new, without at the same time obstructing its passage to such portions of the new windows as were in the sites of the old windows. It was held by the Exchequer Chamber, affirming the judgment of the Court of C. P., that plaintiffs, under these circumstances, could not maintain an action against defendants for obstructing the passage of light to their warehouse windows, as no one of the existing windows substantially corresponded with any of the ancient lights. Channell, B., and Blackburn, J.: It was not necessary in the present case to decide whether there is a right to block up a new window, if it cannot be done without also blocking up an ancient unaltered one.—(*Hutchinson v. Copestake*, 31 L. J., C. P. 19.)

WITNESS.—In order that a party producing a witness may be allowed to give in evidence, under the 22d section of the Common Law Procedure Act, 1854, a written statement of the witness as being inconsistent with his present statement, it is not necessary that the two statements should be directly or absolutely at variance. Cockburn, C. J.: We are all agreed that it would be to frustrate a very valuable enactment, if we were to say that a series of letters was not admissible to show that the witness had previously made a statement inconsistent with the evidence given by him at the trial. I doubt whether even, independently of the statute, the evidence would not have been admissible.—(*Jackson v. Thomason*, 31 L. J., Q. B. 11.)

DEVISE.—Testator, after leaving certain legacies, devised as follows: 'As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to J. J. and D. H., equal between them; but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs.' It was held by a majority of the Court of Exchequer Chamber, that J. J. and D. H. would take under the will only in the event of the daughter dying under age and having no children; and that they took nothing, as the daughter lived to be twenty-one, though she never had any child. *Per Curiam*: The expression which raises this question, expresses affirmatively that if the daughter has issue she is to take. It does not negative that she is to take if she lives to be of full age. We read the will as expressing this: If my daughter dies under age, and have no lawful issue, my brother and D. shall take; but I declare that, at all events, my daughter is to have the property if she have issue, whether she live to be of lawful age or not.—(*Johnson v. Simcox*, 31 L. J., Ex. 38.)

CONTRACT.—Declaration, after stating an agreement, by which plaintiff agreed to sell and transfer to defendant the lease of a certain farm, subject to his being approved of as tenant by S., and on the terms of defendant paying down to plaintiff the sum of L.500 as a deposit, and completing the purchase by a day then named, alleged that, in consideration that plaintiff would dispense with the payment down of the L.500, and take an I O U of defendant for that sum, defendant promised that he would pay plaintiff the sum of L.500 as soon as he could write to his banker at B., and procure such banker to remit the same. Breach, non-payment of such L.500. Pleas—Fifth, that before defendant could procure his said banker to remit as alleged, defendant was disapproved of as tenant by S. Sixth, on equitable grounds, that before demand by plaintiff of payment of the I O U, defendant was disapproved of as tenant by S., and plaintiff rendered thereby unable to transfer the lease to defendant. Replication to the sixth plea.—That before any disapproval of S. as in that plea mentioned,

defendant applied to S. to accept him as such tenant, and that afterwards, and before any such disapproval, defendant withdrew such application, and declined to S. to be accepted as such tenant, and by defendant's own act, and without any default of plaintiff, procured S. to disapprove of him as tenant. The fifth plea was held a good answer to plaintiff's claim. *Per Curiam*: The sixth plea was bad, as it confessed a breach of the contract, entitling plaintiff to the use of the L.500 until the time for the completion of the purchase, and did not show that a court of equity would restrain plaintiff from proceeding in respect of such breach. But the replication was a good answer to such plea, as it showed that the disapproval of S. was procured by the act of defendant himself.—(*Davis v. Nisbett*, 31 L. J., C. P. 6.)

JUSTICE OF THE PEACE.—Declaration that defendants were Justices of the Peace in and for the county of D. ; that plaintiffs were rated to a certain church-rate, the validity of which said rate was, at the time of the making thereof, and from thence hitherto had been and still was disputed by plaintiffs ; that plaintiffs were summoned to answer a complaint that they had refused to pay the rate ; that they attended before defendants ; that at the hearing, plaintiffs, intending to dispute the validity of the rate, gave defendants notice that they disputed the validity of the rate, and required defendants to forbear from and not to give judgment in respect of the matter of the complaint ; that no evidence was given that they did not in fact or in good faith dispute the validity of the rate, or that they did not in good faith give such notice to defendants as aforesaid ; that defendants proceeded to give and did then give judgment, and did then make an order upon plaintiffs for payment of the rate ; that the said order was afterwards removed by *certiorari*, and quashed before the commencement of this suit ; that defendants, before the said order was quashed, issued their warrant to make a distress of the goods and chattels of plaintiffs ; that by virtue of the said warrant the goods of plaintiffs were seized and distrained ; whereby, etc. Upon demurrer to this declaration, it was held, that it sufficiently appeared that defendants had acted without jurisdiction, and therefore that the declaration was good, although it contained no allegation that defendants had acted maliciously and without reasonable and probable cause. Wightman, J. : It must be taken that the objections were made *bona fide* ; and that the defendants knew that they had no jurisdiction ; that they were proceeding against the plaintiffs, notwithstanding there was a *bona fide* dispute. They had no jurisdiction to act as they have done ; the proceeding may be taken as *coram non judice* ; and the declaration is sufficient, though it contains no allegation that the act was done maliciously and without reasonable and probable cause.—(*Pease v. Chaytor*, 31 L. J., M. Ca. 1.)

LARCENY.—The prosecutor, who had lodged at the house of the prisoner's husband, on going away to work at a distance, left his box with money in it, locked up, in charge of the prisoner, who promised to take care of it, and he gave her the key. During his absence she opened the box and fraudulently took the money. Her husband never interfered with her in any arrangements she made with her lodgers, and he had nothing whatever to do with the transaction with the prosecutor, and was wholly innocent. On an indictment charging her with larceny as a bailee, under 20 and 21 Vict., c. 154, sec. 4, and also with a larceny at common law, it was held that if she was a bailee, she might be convicted on the first count ; if not a bailee, on the second count. Pollock, C. B., and Martin, B. : Although she could not enter into a contract of bailment, being a married woman, she might, nevertheless, become a bailee, within the meaning of the above-mentioned statute, by license.—(*R. v. Robson*, 31 L. J., M. Ca. 22.)

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ON THE LAW OF POSTPONED VESTING.

(*Continued from page 67.*)

CHAP. IV.—OF POSTPONEMENT OF PAYMENT TILL MAJORITY
OR MARRIAGE.

NEXT to the institution of *liferents*, there is no class of testamentary purposes more fertile in questions of vesting, than the direction so common in family settlements, to postpone payment of children's provisions until their arrival at complete majority. The chief difficulty in this class of cases consists in ascertaining whether the testator intended to postpone the period of division to an uncertain period, contingent upon the arrival of the children at majority, separately or collectively; or whether, on the other hand, he meant to create an absolute vested interest emerging on his death, qualified only by provisions for securing the fund, and protecting it against the results of accident or improvidence during the period of nonage.

Among the innumerable cases which have arisen upon the construction of settlements regulating the rights of children during minority, there are many which, though involving specialties in the character of the interest given, do not materially affect the vesting of the provisions. Thus it is a frequent condition in testamentary settlements, that the shares of daughters shall be payable at marriage or majority, whichever shall first happen; as in *Wellwood's Trs. v. Boswell* (21 June 1851, 13 D. 1211), where the settlement of

an estate was made contingent on the marriage of a daughter with consent of trustees.

In other cases the testator names a period of life different from that of legal majority, as the term at which payment shall be made, and which has accordingly been termed conventional majority, as in the cases of *Blackwood v. Dykes* (26 Feb. 1833, 11 S. 443), where trustees were directed to hold heritable property for behoof of the testator's son, until he should arrive at the age of 25 years, when they were to convey the property to him; and *Reid v. Coates* (10 March 1809, F. C.), where a residue was made payable to the heir on his attaining the age of 27. In other cases the period of division has been fixed with reference to the age of one of the children of the family; as, for example, on the youngest child attaining majority (*Scheniman v. Wilson*, 25 June 1828, 6 S. 1019), or the age of 18 (*Clark v. Paterson*, 5 Dec. 1851, 14 D. 141), or the age of 36 (*Broun v. Campbell*, 16 March 1855, 17 D. 759). It is scarcely necessary to remark, that the substitution of a conventional term in place of the legal age of majority is of no importance as an element in the determination of questions as to suspension.

There is another element which may generally be disregarded wherever minority is the occasion of postponement. We refer to the circumstance of a liferent being interposed, and thereby causing a further postponement of the period of division. The observations which have already been made regarding the effect of postponement to a time certain, relieve us from the necessity of proving that a clause merely postponing payment during the currency of a life interest, unaccompanied by a limitation to survivors or other contingent destination, does not *per se* suspend the vesting of the beneficial interest. Accordingly, if the period appointed for payment is dependent both upon the expiry of a liferent and the attainment of majority, and if there is such contingency in the destination as will necessitate a suspension of vesting during minority only, the succession will vest at majority. The expiry of the liferent during the minority of the fiar will not accelerate the vesting of the succession, nor will the continuance of the liferent after the beneficiaries are major prevent the acquisition of a vested interest (*Matthew v. Scott*, 21 Feb. 1844, 6 D. 722). If, however, the contingent destinations are intended to cover the event of a failure, *either* during minority or the subsistence of the liferent, the vesting will necessarily be deferred until the exhaustion of both the periods of contingency.

In a systematic exposition of the law, it is more conducive to clearness to consider each ground of postponement separately. But in practice it will be found that, as the presumption for the suspension of vesting is much stronger in the case of a condition by which payment is made contingent on the attainment of majority, than in the case of a mere suspension for the benefit of a liferenter, the construction of the provision with reference to vesting is virtually determined by the former element.

It was at one time maintained that the maxim of the civil law, *dies incertus pro conditione habetur*, applicable in its original acceptation to matters of contract, ought to be applied inflexibly to the interpretation of clauses postponing payment in deeds of settlement. A rigorous extension of the maxim would doubtless have relieved the Court from all difficulty in dealing with the class of cases under consideration. Rights emerging at majority or marriage being affected with a radical uncertainty as to whether the beneficiary shall ever attain the status upon which payment is made dependent, it would follow, if effect were given to the maxim, that in every family settlement making provision for the care of the property of minors, the period of vesting must be coincident with the period of division. It will be seen that this is, in fact, the rule of construction applied to general and special legacies, as well as specific provisions of heritable property. But in the case of destinations of residue it was seen that the strict application of the maxim would lead to injustice; because, unless the settlement provided in express terms for the contingency of failure during the period of minority, the effect was, that the residuary interest would in that event fall as a lapsed succession to the next of kin, instead of devolving, as the settler probably intended, upon the heirs of the residuary legatee or his surviving co-legatees. Naturally, therefore, the leaning of the Court has been in favour of the principle of vesting *a morte testatoris*. It has accordingly been laid down, without derogating from the authority due to the rule as to *dies incertus*, as presumptive of postponed vesting, that slight evidence of a contrary intention on the part of the testator shall suffice to overcome the presumption, and fix the period of vesting as at his death.

In the further elucidation of the subject, it will be convenient to classify the cases with reference to the character of the interests the postponement of which is in question.

Section 1. Case of a Postponed Residuary Interest, either (1) without a Contingent Destination, or (2) with a Destination over or clause of Survivorship.

1. In the decided cases falling under the first division of this section, the element of intention does not appear to have received much attention. The leading authority is *Torrie v. The King's Remembrancer* (31 May 1832, 10 S. 597). The testator had appointed the residue of his heritable and moveable estate to be paid over to his two natural children, 'equally betwixt them, share and share alike, and their *heirs and assignees*,' the provisions being declared 'not to be payable until they shall respectively attain the age of majority or be married.' Both children survived; one died a minor. No provision was made for the application of the accruing interest. This fact, coupled with the conditional institution of heirs, was supposed to be so manifestly suspensive of vesting (see *Bell v. Cheape*, 21 May 1845, 7 D. 614), that the point was conceded, and the argument for the surviving residuary legatee rested on the doctrine of the *jus accrescendi* in joint destinations. But the Court were clear that this was not a joint destination, and accordingly preferred the testator's next of kin to the lapsed share. However, in *Clark's Exrs. v. Paterson* (5 Dec. 1851, 14 D. 141), a destination to heirs and assignees of the residuary legatees was held to be a clear indication of intention that the shares should vest *a morte*. Here the trustees were directed to 'pay or apply' the residue amongst the children *nominatim* and *nascituri*, 'their heirs and assignees, share and share alike,' when the youngest child had attained the age of 18; and this direction was followed by a clause of survivorship, to be operative in the event of any of the children 'dying intestate, and without heirs of their bodies, before receiving payment.' One of the daughters having died before the period of payment, after surviving the testator, the Court held that her share had vested in her husband, as legal assignee, under the destination to heirs and assignees. 'I apprehend,' said Lord Fullerton, 'that when a legacy is so granted that the legatee has the power of testing upon it, or assigning it, to all intents and purposes that legacy vests, unless there is the strongest evidence of an intention that it shall not vest. All that we have here is a postponed term of payment, coupled with these considerations—that there is a power

of assigning and a power of testing' (14 D. 145; see also *Queen's Remembrancer v. Dougall*, 12 Feb. 1841, 3 D. 548).

Where there are elements of true contingency in the destination, in addition to the postponement of payment, the vesting will be suspended during the subsistence of the contingent interest. This principle is illustrated by a recent case, in which trustees were directed to divide the succession on the youngest daughter attaining majority, subject to a proviso, that if any of the children succeeded to property exceeding by L.3000 the value of his share, such share should be divided amongst the survivors. The Court ruled that the shares could not vest *a morte testatoris*, except subject to the condition of forfeiture in the event of the beneficiary succeeding to other property (*Cunningham v. Cunningham*, 6 July 1858, 20 D. 1214).

2. That a destination over, either to the surviving legatees or to a third party, is suspensive of vesting, is a proposition so firmly fixed in our practice, that it becomes unnecessary in this place to enter upon a review of the cases in which it has been recognised; more especially since, in the case of payment being at the same time postponed to majority (where the concurrence of two separate elements of contingency was involved), it was felt to be hopeless to struggle against the application of the rule. It may be sufficient to mention that, in the following instances of a residuary destination to children in shares payable at majority, with a destination over, the vesting was held to be suspended till the period of payment,—viz., in *Stewart's Trs. v. Stewart* (17 July 1851, 13 D. 1387), where there was a contingent remainder to the settlor's brother in the event of there being no children surviving the period of payment; in the case of *Blackwood v. Dykes* (26 Feb. 1833, 11 S. 443), where the trust was for conveyance to a second son at the age of 25, with remainder in the event of his death before attaining actual possession of the estates to his issue, whom failing, to the testator's heirs and assignees whatsoever; and in *Wright v. Ogilvie* (9 July 1840, 2 D. 1357), where there was a contingent destination in the event of failure of children to a widow in alimentary liferent, with remainder to the testator's assignees, and a destination over. The same rule was applied in the case of *Ogilvie v. Cuming* (27 Jan. 1852, 14 D. 363), to a destination of the residue of heritable and moveable estate, with this variation, that, the institute having died *after majority*, but before receiving possession of the estates, the Court preferred the next heir substitute to the institute's legal representatives, on the ground that

the words of the destination imported a proper substitution. In the following cases, the residue was given to a plurality of persons, with the benefit of survivorship; and the vesting was in every instance held to be postponed till the period of payment, from the necessity of preserving the contingent interest of the survivors unimpaired,—viz., in *Greig v. Johnston* (1 July 1833, 6 W. and S. 406, affirming 9 S. 806), and in *Campbell v. Reid* (12 June 1840, 2 D. 1084), where, however, the yearly interest for each term was held to belong to the children surviving such term, as it accrued; and, finally, in the case of *Walker v. Park* (20 Jan. 1859, 21 D. 286), where a clause of survivorship was found to have the effect of suspending the vesting, notwithstanding the direction to employ the annual proceeds of the estate in the maintenance and education of the beneficiaries.

However, it was laid down in two recent cases, that a general destination to the testator's children, payable to the survivors at a period fixed with reference to the majority of the children, *vests in them as a class* from the time of the testator's death. Although, therefore, the interests of the individual children cannot be said to vest *a morte*, on account of the uncertainty as to the extent of the interest, yet if that uncertainty should be removed by the death of all the children *except one*, before the period of division, there is no longer any obstacle to prevent the complete vesting of the succession in the last survivor. This is the import of the cases of *Cattanach v. Thom's Exrs.* (2 July 1858, 20 D. 1206, 1st Div.), where the succession was given to the only child and *heir of the last survivor*, who had died in minority; and *Maitland's Trs. v. M'Dermid* (15 March 1861, 23 D. 732, 2d Div.), where the residue was given to the *testamentary heir* of the last survivor, dying in minority, in preference to the truster's next of kin. The Lord J.-C. Inglis observed, 'It is beyond all doubt that the beneficial interest in the truster's estate was vested in his children as a class; though, by the provisions of other clauses, that vesting may be postponed as regards some of the children, and as regards others it may suffer defeasance' (23 D. 736).

Section 2. Case of General and Special Legacies and Provisions.

In this class of cases the conflict between theory and intention, which was maintained for a long period with varying success, has been productive of great uncertainty in the administration of the

law. The presumption against a lapse is certainly weaker in the case of a legacy than in the case of a residuary share; for while a lapsed residuary legacy falls into the residue, a lapsed residuary share necessarily passes to the next of kin as intestacy,—a result which can scarcely be supposed to have been within the contemplation of the testator. Without pretending to reconcile all the authorities, we believe the import of the decisions on the vesting of postponed legacies may be fairly represented in the following propositions, premising that we deal at present only with postponement till marriage or majority; the subject of postponement with a view to the security of life interests having already been the subject of discussion in a previous section: (1.) A declaration that legacies are to bear *interest*, or that interest is to be exigible or payable during minority, is held to raise a presumption that the testator intended the provision to vest *a morte*, though such intention be not expressly declared. A direction to hold for behoof of children in minority, seems to be equivalent in effect to a direction to pay interest, especially if the fund is made chargeable with their maintenance. (2.) A destination to heirs and assignees of the institute also implies a vesting *a morte testatoris*. (3.) Where a legacy is given jointly, or in shares to *all* the children of a party surviving the testator, the provision does not vest till, from the death of the parent, or other circumstances, the number of the beneficiaries entitled to succeed is finally ascertained; and, on principle, the substitution of survivors should also be suspensive of vesting until the period of payment. (4.) It would seem that a legacy given to a party simply, without substitution or other qualification, payable at majority, does not vest till payment, as in this case there is no indication of intention to exclude the application of the doctrine of conditional vesting.

1. Notwithstanding the recognition of the rule, that ‘majority’ and ‘marriage’ are conditions suspensive of vesting, in the case of *Home v. Home* (28 Jan. 1807, Hume, 530), where the distinction between simple postponement and contingency was, for the first time, clearly established,—the intention of the testator was very soon after brought in as a disturbing element. Thus, in *Wood v. Burnett’s Trs.* (2 July 1813, Hume, 271), where legacies of L.1000 each were bequeathed to the children of a stranger, *the produce thereof to be accounted for yearly* and the principal sum transferred to each legatee as soon as he arrived at the age of majority, and the children all died minor,—the Court held, that the beneficial interest had

vested *a morte testatoris*, so as to be transmissible to their representatives. The principle here laid down, that an unconditional gift of the annual proceeds implies a vested interest in the capital, has been confirmed by a series of concurring decisions (*Matthew v. Scott*, 21 Feb. 1844, 6 D. 718; *Kennedy v. Crawford*, and *Ralston v. Ralston*, *infra*); and it is now settled, that, even with a destination to survivors, the vesting will not be postponed beyond the period when interest is payable. In *Kennedy v. Crawford* (20 July 1841, 3 D. 1266), the testator directed his trustees to make payment to the younger children of his son, Peter Crawford, of the sum of L.2000 'equally amongst them, with the lawful interest thereof, from the first term of Whitsunday or Martinmas after the said Peter Crawford's death, should that happen before the children should arrive to majority; my said trustees employing the interest of that sum from the time of my death, for the maintenance, clothing, and education of the said younger children during their respective pupillarities and majorities,' and to divide the capital, as soon as the youngest arrived at majority, amongst the *surviving* children. The Court were much divided in opinion, as to whether the legacies vested at the death of the testator; but it was finally determined by a majority, that the shares had vested, and were arrestable before the period of payment: the Lord Pr. Boyle observing, that when a sum was appointed to be paid with lawful interest from the testator's death, that implied that the sum itself was to be paid as well as the interest; and that as to the direction to apply the interest in the maintenance of the children, and to pay up the capital when the youngest child should attain majority, *that* went only to the management, and not to the question of vesting (3 D. 1270). So also in the case of *Ralston v. Ralston*, where a legacy was made payable to one child, whom failing, to two others, or to the *survivor*, 'with the interest thereof from six months after my death, payable the said interest to their legal guardians for their behoof,' the principal being payable at the period of majority,—the Second Division held unanimously that the right to the legacy vested in the institute on his survivance of the testator (8 July 1842, 4 D. 1496; see also, *Wilson v. Wilson*, 9 July 1842, 4 D. 1503,—a somewhat special case).

In *Hamilton v. Dougall* (12 Feb. 1841, 3 D. 548), the trustees were directed to hold the residue of moveable estate *for behoof of the truster's natural daughter during her minority*, subject to the payment of an annuity; and the trustees were further directed to avail

themselves of any favourable opportunity for investing the funds on heritable security, *for behoof of his daughter and the heirs of her body*; whom failing, to his own lawful heirs. The daughter having died in minority, without issue, the estate was claimed by the Crown, who maintained, on the authority of the cases of *Wood v. Burnett's Trs.* (Hume, 271), and *Hardman v. Guthrie* (6 June 1828, 6 S. 920), that a *jus crediti* vested in the daughter, and was transmitted to the Crown as *ultima hæres*. The judges appear to have leant to the opinion that there was a vested interest in Miss Dougall, but found it was unnecessary to decide the point, being of opinion that the destination implied a *substitution* which would carry the estate to the truster's heir-at-law upon the death of the daughter without issue.

2. With regard to the effect of a destination to heirs and assignees of the legatee, we may refer to our remarks on the case of *Clark v. Paterson* (5 Dec. 1851, 14 D. 141), in the previous part of this section. The import of the decision is, that a bequest of residue to one or more parties, and their 'heirs and assignees,' vests a *morte testatoris*. The case of *Bell v. Cheape* (21 May 1845, 7 D. 614), in which the construction of those important words was settled by a decision of the whole Court, is quite consistent with *Clark v. Paterson*, for the Court decided only that the legacy was not assignable *until* it vested; and in this case the legacy could not vest a *morte testatoris*, being expressly made contingent upon the failure of a *liferentrix* without issue her surviving. There does not seem, therefore, to be any good reason for doubting that a bequest to a legatee, his heirs and executors, becomes immediately assignable on the legatee's survivance, notwithstanding the postponement of payment till majority.

3. We proceed to notice the case of a joint legacy bequeathed to children of a family, with reference to the question whether the intention is to benefit the children alive at the death of the testator only, or to continue the trust so as to include those who may be afterwards born. On this point the cases of *Scheniman* and *Biggar's Trustee* may be compared. In *Scheniman's* case, a *liferent* was given to the mother, the fee being payable to the children after the youngest had attained majority; and the structure of the settlement clearly evinced an intention to include all the children of the *liferentrix*. However, when the case came into court, Mrs *Scheniman* consented to the capital being paid over to the children then in

existence; and as she was then 48 years of age, and her youngest child was 26, the judges thought there could be no reasonable objection to an anticipation of the period of vesting, and appointed the trustees to denude, on security being found for payment of the life interest, and also for the eventual interest of any other grandchildren of the testator that might be born (*Scheniman v. Wilson*, 25 June 1828, 6 S. 1019). The case of *Biggar's Trustee v. Biggar* (17 Nov. 1858, 21 D. 4) was somewhat different. The testator, by his codicil, gave the whole residue of his estate to his wife in fee, with a conditional institution in favour of the children of his son John Biggar, and the survivor of them; whom failing, to John Biggar himself. The testator survived his wife; and the question was, whether the succession opened to the grandchildren surviving the testator. There was no provision for a continuing trust, or for the accumulation of interest; and in view of these circumstances, the First Division were of opinion that the intention was to benefit the children surviving the longest liver of the spouses. The fact that the postponement of vesting would exclude the possibility of the testator's son succeeding under the ulterior destination, was also taken into view as an element in the determination of the testator's intention. As the majority of the Court were satisfied that the period of distribution had already arrived, it was of course unnecessary in that view to exact security for the interest of future children. On this point, however, Lord Deas took a different view, holding that, although the surviving grandchildren were entitled to be put into possession of the fee, their shares were subject to abatement, in the event of new interests emerging by the birth of other children in the family (see also *Lord v. Colvin*, 23 D. 114, 'Case').

With regard to the import of a clause of survivorship or destination over in a postponed legacy, the effect will be the same as in the case of residuary shares. As a general rule, such contingent destinations necessitate a postponement of vesting until the period of payment (*Croom's Trs. v. Adams*, 30 Nov. 1859, 22 D. 45), unless it is apparent, from the consideration of interest being payable from the commencement of the trust, that the settlor intended to give an immediate vested interest (see the cases of *Ralston v. Ralston*, 4 D. 1496; *Wilson v. Wilson*, 4 D. 1503; and *Kennedy v. Crawford*, 4 D. 1266).

4. The principle has been clearly established by several of the early cases, that provisions, the payment of which, whether with or

without interest, is deferred till majority or marriage, do not vest in the meantime (*Home v. Home*, 28 Jan. 1807, Hume, 530; *Grindley v. Merchants' Maiden Hosp.*, 1 July 1814, F. C.; *Arbuthnott v. Arbuthnott*, 7 June 1816, Hume, 536; and *Torrie v. King's Remembrancer*, 31 May 1832, 10 S. 597). We have already considered various exceptions which have been introduced by the refinements of modern construction; and, as the truth of the rule has not been questioned as an abstract proposition, however much its authority has been controlled by the doctrine of presumed intention (*Forbes v. Luckie*, 26 Jan. 1838, 16 S. 374, and cases cited in the preceding paragraph 1), it will not be necessary to refer again to the subject.

With regard to the accumulated proceeds of the succession during the period of postponement, these will either go with the capital, or fall into the undisposed of residue, and will necessarily vest at the same period as the fund to which such accumulations may be found to belong by way of accession. The question of the appropriation of accumulations is one of intention depending upon the terms of the settlement; and the investigation of such questions would lead us into the extensive subject of the interpretation of destinations in trust deeds, and the doctrine of lapsed legacies, which, except in so far as their consideration may tend to elucidate the subject of vesting, are foreign to the object of the present topic of discussion.

THE VALUATION ACT.

THE Valuation Act of 1854 is perhaps the most popular of all Mr Moncreiff's measures. The machinery established has, in practice, worked remarkably well; being at once simple, inexpensive, and rapid in its operation. The annual revisal of the roll provides for the constantly altering circumstances of the country, and the astonishing rise in the price of land which followed the repeal of the Corn Laws, and appears to be still in progress. Not only is the collection of taxes, general as well as local, so far as leviable on lands and heritage, made more just and equitable; but it has been recently found that the Valuation Roll may be applied to a variety of other purposes, which have made it one of the most useful public documents which we possess. By means of it we have been enabled to dispense with the former troublesome, and, in some respects, unfair system of registering municipal and parliamentary electors. Registration

courts, and the violent political battles of which they were annually the scene, have practically ceased to exist; and with them has fallen that absurd court of appeal, composed of three sheriffs, which was so long a reproach to our judicial system. The Valuation Roll also now forms a ready means of determining claims to act as Commissioners of Supply.

The history of the old extent of Alexander III. and the new extent is so fully treated by Lord Kames, in the fourteenth of his *Historical Law Tracts*, and is now so purely a matter of antiquarian interest, that it is not necessary to explain the old law as to valuation. The curious in such things will find a very learned statement on the subject, supposed to have been prepared by Mr Thomson, in the case of *Cranstoun v. Gibson*, 18 May 1818, F. C. It is only necessary to remind the reader, that the valuation of the different counties of Scotland, which was effected during the Usurpation, for the purpose of doing away with the inequalities then felt to exist in the levying of the public rates, called the *Valued Rent*, and according to which the land-tax and the other public and parochial assessments were subsequently imposed, bears date about the year 1670. The Poor Law Act of 1845 was the first important interference with this venerable mode of assessment. It provided that, in estimating the lands and heritages subject to poor rate, the same should be taken to be the rent at which, one year with another, they might be reasonably expected to let. The rule was found to be so easy of operation, that it paved the way for its extension, within the next ten years, to all kinds of rating, by means of the statute under consideration. A comparison between the valuations of the different counties of Scotland, as ascertained by the present machinery and the old valued rent of two centuries ago, will show the necessity existing for such a measure, and the extraordinary progress of the country during that period:—

| COUNTIES. | VALUED RENT. | VALUATION 1860. |
|--------------------|----------------|-----------------|
| Aberdeen, . . . | L.19,418 . . . | L.526,640 |
| Argyle, . . . | 12,466 . . . | 320,477 |
| Ayr, . . . | 15,967 . . . | 736,187 |
| Banff, . . . | 6,600 . . . | 176,701 |
| Berwick, . . . | 14,864 . . . | 311,132 |
| Bute, . . . | 1,253 . . . | 37,292 |
| Caithness, . . . | 2,970 . . . | 97,016 |
| Clackmannan, . . . | 2,207 . . . | 68,424 |
| Dumbarton, . . . | 2,777 . . . | 201,769 |
| Dumfries, . . . | 13,219 . . . | 350,636 |
| Edinburgh, . . . | 15,921 . . . | 387,310 |

| COUNTIES. | VALUED RENT. | VALUATION 1860. |
|----------------------|--------------|-----------------|
| Elgin, . . . | L.5,467 | L.116,851 |
| Fife . . . | 30,208 | 584,445 |
| Forfar, . . . | 14,286 | 465,901 |
| Haddington, . . . | 14,072 | 264,475 |
| Inverness, . . . | 6,099 | 215,506 |
| Kincardine, . . . | 6,243 | 176,326 |
| Kinross, . . . | 1,674 | 51,484 |
| Kirkcudbright, . . . | 9,549 | 258,258 |
| Lanark, . . . | 13,511 | 906,102 |
| Linlithgow, . . . | 6,237 | 155,788 |
| Nairn, . . . | 1,263 | 26,838 |
| Orkney, . . . | 7,050 | 43,193 |
| Shetland, . . . | | 28,017 |
| Peebles, . . . | 4,328 | 83,663 |
| Perth, . . . | 28,330 | 725,704 |
| Renfrew, . . . | 5,764 | 337,177 |
| Ross, . . . | 6,608 | 184,852 |
| Roxburgh, . . . | 26,222 | 347,367 |
| Selkirk, . . . | 6,692 | 67,044 |
| Stirling, . . . | 9,042 | 321,361 |
| Sutherland, . . . | 2,266 | 54,827 |
| Wigton, . . . | 5,634 | 170,906 |

The duty of making the valuation was entrusted to the commissioners of supply and the magistrates in burghs ; and the officer they employed was declared entitled to the assistance of the officer of Inland Revenue,—the Government requiring a valuation for their own purposes. As the latter, however, is in general a person well fitted for the duty, there was an obvious propriety in making the Government Valuation Roll serve for all. Power was accordingly taken in the Act of 1857, 20 and 21 Vict., c. 58, to enable counties and burghs to carry this arrangement into effect ; and now, with only a few exceptions, the officers of Inland Revenue having the survey of the income tax and assessed taxes within the county or burgh, have been appointed by the magistrates and commissioners of supply assessors for the purposes of the Valuation Acts. The expense attending the making up of the Valuation Roll is, in such circumstances, defrayed by the Commissioners of Inland Revenue, and the arrangement has many other considerations to recommend it.

At the same time, advantage was taken of the opportunity to provide a cheap and expeditious form of review by the Judges of the Supreme Courts, for the correction of the various errors into which bailies and country gentlemen are prone to fall in dealing with questions of law. The Act of 1857 (sec. 2) provides that an appeal may lie against the valuation of the officer of Inland Revenue to the commissioners and magistrates ; and if either the person appealing,

or the valuator, shall apprehend that the determination of the commissioners or magistrates hearing such appeal is contrary to the true intent of the Act, and shall then declare himself dissatisfied with such determination, it shall be lawful for such officer and appellant respectively to require the said commissioners and magistrates to state specially and sign the case on which such question arose, together with their determination thereupon; and to transmit such case to the Commissioners of Inland Revenue, to the end that the same may be submitted to the Senior Lord Ordinary and Lord Ordinary officiating in Exchequer Causes in the Court of Session, for their opinion thereon; and such Judges to whom such case may be submitted, shall with all convenient speed give and subscribe their opinion thereon; and according to such opinion the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed. The cases appealed up to 26th November last are in number 35, and have been printed for official use. As the matters with which they deal are new in the law, and at the same time of great professional importance, we shall briefly indicate the points on which controversy has arisen, and the mode in which they have been settled.

Valuation simply means what a thing is yearly worth; but in counting this up, two views at once present themselves to the mind—its worth to the proprietor, and its worth to the public. To ascertain the former, we require only to know how much it originally cost; and a percentage on the amount will be its annual *cost* to the proprietor, and consequently its value in *his* estimation. Cost and value, however, are by no means synonymous terms, as every one who has had any dealings in the stock market very well knows. More properly, the worth of a subject is what it will bring when submitted to public competition. Therefore the standard of value fixed by the Act is the rent at which, one year with another, the lands and heritages might in their actual state be reasonably expected to let from year to year. There are, however, many descriptions of property which would be useless, or, at all events, comparatively valueless, to any person save the party in possession; and which, consequently, could not be let all. Thus the value of a mill or manufactory depends on the machinery it contains, and the kind of business for which it has been put up, and which, if offered on lease, would produce nothing like a fair return on the capital invested. In dealing with this kind of property, we have no proper

data for ascertaining its real marketable value, and the proper mode of assessment has given rise to much discussion. The valuers throughout the country appear to have contented themselves with a rough equitable adjustment of the difficulty, by putting down a certain per centage on the actual cost. The mill-owners contend that, if their property is to be so treated, gentlemen's country houses should be estimated in the same way. But this is not done,—they are entered at the probable rent which they would bring, were they in the market. Many a country house, which may have cost L.5000, would not bring L.50 a year if offered on lease; and it is therefore said to be unfair that a mill, which cost the same sum, should be entered at five times the latter amount. The subject is one of the difficulties with which the Act of Parliament does not attempt to deal. We observe that last year the opinion of the Judges was taken upon the question. A silk-mill at Govan, in the occupation of the owners, was estimated, on the principle stated, at L.497. The proprietors appealed, contending that all heritages in the occupation of the owners should be valued on one principle—whether gentlemen's residences or public works. If public works in the occupation of the owners are to be valued at a certain percentage on their cost, private residences in the occupation of their owners ought all to be valued at the same percentage, because the Act does not allow two modes of valuation; and, on the other hand, if private residences are valued simply at what it is thought they would rent at from year to year, such a factory as theirs should be entered at nothing, for no one would take and fit up machinery in a factory which was to be let from year to year. The assessor very properly answered, that the objection was not that the factory was valued too high, but that other descriptions of property in the neighbourhood were valued too low. The judges, apparently dealing with the point as a jury question, on which the commissioners were entitled to exercise their own opinion, affirmed their decision, sustaining the valuation of the assessor. (Case 30.)

Again, what is rent? The Act says, 'Where such lands and heritages are *bona fide* let for a yearly rent, conditioned as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value.' Does rent mean the sum paid by the tenant as the price of his possession, or only that portion of it which goes directly into the landlord's pocket? It is a common stipulation in a lease, that

in addition to the money rent, the tenant shall be bound to pay interest on such sums as the landlord may choose to expend in improvements. In such circumstances, the amount paid as interest is obviously an additional rent, which falls to be added to the money payment, in order to ascertain the true value of the farm. (Case 5.) Does it make any difference, that the obligation to lay out a certain sum in improvements, the interest to be paid by the tenant, is contained, not in the lease, but in a subsequent agreement? In a case of this kind, the landlord contended that this was a mere voluntary act on his part, apart altogether from the lease; that he had no hypothec in respect of the interest, and that therefore it ought not to be taken into account. The assessor answered, that the interest paid on the money expended was substantially an additional rent, conditioned for by a new and supplemental contract, whereby the landlord on the one hand undertook to make the subject more valuable, and the tenant on the other agreed to pay so much the more in consideration thereof; the present value of the subject being represented by the total sum paid in name of both rent and interest. The commissioners were of opinion that, in the circumstances, the interest paid by the tenant ought not to be taken into account; but the judges held that they were wrong. (Case 5, 1st branch.) The corollary from this decision is, that it is a mistake to say that the only legal test of 'rent' is whether it be covered by the landlord's hypothec.

Obviously, however, the money devoted to improvements must be spent in works of a permanent character, calculated to enhance the value of the subject itself. A landlord who lent his tenant money to purchase cattle and horses, would not be required to count the interest paid on the loan as part of his rent, any more than if the advance had been to enable him to buy a new hat. A landlord undertook to spend L.1000 on improvements during the first two years of the lease, on which the tenant bound himself to pay 5 per cent. By subsequent agreement, L.800 was spent on fences (L.56 of which went for sheep-drains), and L.200 for a top-dressing of lime on the pasture. The tenant further undertook to expend L.100 on houses, which the landlord promised to repay him 'when convenient,'—the sum likewise to carry 5 per cent. after such payment by the landlord. As to the latter sum, the judges, reversing the decision of the commissioners, held that a sum equivalent to the interest fell to be included in the valuation; for so long as the money

was not repaid by the landlord, the tenant pocketed as lender the interest payable by him as tenant. They also held that the return paid on the L.200 spent in lime, and the L.56 in sheep-drains, ought not to be included, but that the interest of the sum spent in fences was properly part of the rent. (Case 6.)

As the annual value of property is improved by the capital laid out on it, it is immaterial whether the money is contributed by the landlord himself, or obtained from other sources, provided the interest forms part of the sums paid by the tenant. Therefore, where a loan is obtained from Government under the Drainage Act, 9 and 10 Vict., c. 101, to be laid out on the farm, the rent charge of 6½ per cent. payable by the tenant must be added to the rent stipulated in the lease, in order to ascertain the true value of the lands. (Cases 7, 8, 9.) On the same principle, when the rent fluctuates with the fiars prices, and it is conditioned that, when it reaches a certain sum, the surplus is to be payable, not to the landlord, but in making improvements, the whole rent falls to be entered in the Valuation Roll, and not the sum actually received by the landlord. The excess is just so much capital laid out on the farm, adding to its ultimate value, and is as much derived from the tenant as the portion of the rent not expended, which goes direct into the landlord's pocket. (Case 26.)

When lands such as grazings are let for the season, they are held to be in the occupation of the proprietor; and their proper value is the rent which, one year with another, they might probably bring if let for ordinary agricultural purposes. (Cases 10, 11, 12.)

The statute says that the rent stipulated in the lease is only to be taken as the fair value, when it is 'without *grassum* or other consideration.' In the latter case, it is the assessor's duty to make a fresh valuation. In a lease of nineteen years from Whitsunday 1850, the rent was L.155; and the tenant, at his removal, was to receive L.450 in respect of a dwelling-house he had recently erected. The assessor added 5 per cent. on this sum to L.155, making together L.177, 10s.; and the commissioners were held to be wrong in holding this to be the true value, the judges being of opinion 'that the subjects should be valued as they now exist, irrespective of the lease.' (Case 16.)

The Valuation Roll is usually made up for the year from Whitsunday to Whitsunday, and doubts have occurred as to the proper

assessment, where a new tenant, at a higher rent, enters at Whitsunday to the houses and grass, and as to the lands at Martinmas, or the separation of the crop from the ground. In such a case, Whitsunday is the term of entry, and therefore the new tenant is properly entered in the Valuation Roll as the tenant and occupier. The increased rent, however, is not the proper value of the farm for the first year. It is the same as if a sitting tenant paid an increased rent, beginning the rise at an intervening term. Suppose, for example, one year's rent is to be, say L.100, payable half-yearly, and for next year L.150, the rent for the year from Whitsunday 1861 to Whitsunday 1862 is plainly the mean between the two—namely $(L.50 + L.75)$, L.125. That is the sum actually drawn by the landlord, and is the true *bonâ fide* rent of the farm. (Case 21.) In like manner, when a new tenant succeeds his predecessor at Whitsunday at a higher rent, and the outgoing tenant pays his last half-year's rent at Martinmas following, the mean between the rents of the old lease and the rent under the new lease should be entered in the Roll as the value of the first year's possession of the incoming tenant. The distinction seems to have been at first overlooked in the first case in which it was presented (Case No. 1), but it has been subsequently corrected (Cases 13, 14, 21, 22, 23). Where the rent is partly money and partly the converted value of the fiars prices, the proper course is to take the prices struck in the preceding March (Case 23).

(Conclusion in our next Number.)

EVIDENCE IN DIVORCE CASES.

IN every inquiry the object must be the truth. There can be no other reason for the trouble of inquiring. This holds in law as in everything else. That branch of law, then, which relates to evidence, should consist entirely of such rules as favour the discovery of truth. It should include none, the observance of which would tend to make this discovery difficult or impossible; and it should, to be perfect, include all, attention to which would facilitate the discovery.

This is a very simple view of what the law of evidence ought to be. Practically, it is a branch of law crossed by a multitude of other branches, and shaped and twisted into conformity with them. A court will not look, for instance, at the most perfect deed which

lacks the stamp required to be upon it by the revenue laws. If truth were the sole end and object of courts of justice, they would certainly not reject such a deed. But they are obliged to discover the truth, if they can, in a way which shall not be prejudicial to the public interests. If a suitor neglect his duty to the State in a matter of revenue, by and by the State will be even with him, and decline to do him justice, just because of his neglect. This is but one of many of the ways in which the other branches of positive law act upon the theoretic law of evidence.

The result is, that in no country does the law of evidence conform even nearly to what, on theory, it should be. Certain persons are, in some cases, incompetent witnesses; the most satisfactory parol evidence is not allowed to prove the simplest fact which on a State policy is required to be established by writ; and certain writings, though they supply excellent evidence of the facts to which they relate, are declared worthless because of their want of some formality, often of the pettiest sort, required by antiquated statutes. Every one who knows anything of the practice of law can cite cases of the failure of justice through such rules. Men are convicted who might be acquitted, did the law allow every form of evidence likely to throw light on their conduct; debts are held undischarged that were paid; and obligations that are undoubted, are held never to have been undertaken. Frequently the parties, their agents, their counsel, and the Court, are all alike fully aware that wrong is being done and right defeated. What matter? Is not the car the car of Juggernaut? Down on the rails!

Down on the rails! After all, the car is a great institution, of unquestioned antiquity—monument of the wisdom and experience of our fathers—and may have much meaning and no little utility in it. Faraday says that you cannot get positive electricity without negative. That our law of evidence has its attendant evils is nothing. What has not? The true question is, Does it on the whole produce the most good with the least evil that it might?

This is a large question, and we mean to treat only of a corner of it. One word, however, in passing, on the general question. Where evidence is to be preserved in writing, the writ necessarily must have, on the face of it, proofs of its genuineness and authenticity. Often writings fall to be tendered as evidence long after the generation has passed away to which belonged the witnesses who might have spoken to their genuineness. It is, therefore, better that

where these proofs, prescribed by statute, are wanting, the deed should be ignored and individual wrong suffered, than that a lax system of recording obligations should be allowed to prevail. Did such a system prevail, the number of cases in which it would be absolutely impossible for the human mind to say what was proved, and in which, therefore, there would be a failure of justice, would far exceed those now occurring in which, through defect of form, wrong is sustained. This kind of restriction, then, on the theoretic law that all evidence should be looked at, results from an excellent and beneficial State policy. The same cannot be said for the restriction arising from the operation of stamp laws. Where these laws are not observed, the State policy should be to inflict penalties for the non-observance which should have some proportion to its gravity, and not to exclude the evidence which, but for the non-observance, would have been perfect—an exclusion, the results of which may often be out of all proportion to the gravity of the non-observance. And, to a certain extent, this is the State policy, but not to the full, as numerous cases occur to show. More particularly is the operation of the stamp laws on evidence purely mischievous and intolerable in that class of cases in which it is doubtful, till after judgment on the point—if judgment ever can be held to be final—whether a document requires to be stamped or not. This is a subject requiring the attention of the Legislature, of which we say no more at present. What remains of the general question—the inadmissibility of witnesses in certain cases, on, generally, vague principles of humanity, and of doubtful expediency,—we proceed to discuss more at length, as appropriate to the heading given to this article.

What reasons can be stated for excluding parties from being witnesses in cases of divorce? So far as we can learn, they are four in number:—1. No one should be compellable to be a witness to criminate himself. 2. The parties in divorce cases, if made witnesses, would be under strong temptations to commit perjury. 3. Humane feeling forbids placing in the witness-box persons to speak to their own shame in such a case. 4. A vague reason derived from consideration of divorce as affecting status. We shall briefly consider these in their order, premising that they are all reasons apart—with the exception of the second—from the effect of making the parties witnesses on the object of the inquiry, *i.e.*, the ascertainment of the truth,—to which, as the chief thing on every account to be aimed at, we shall towards the end direct attention.

1. *No one should be compellable to be a witness to criminate himself.*—In the first place, this principle would exclude only one of the parties—the one whose alleged adultery is the ground of action,—and would exclude him only in the case of his being guilty. He should at least be a competent witness, for he may not be guilty; and if a competent witness, he may be able to throw light, by his evidence, on circumstances that tell against him, and alter the whole colour of the proof. Many cases are imaginable in which the defender's evidence may be necessary for *absolvitur*, as well as many in which the pursuer's evidence may be necessary for decree. The defender, therefore, should be a competent witness at least, if not compellable,—i.e., so far as the reasons stand apart from the policy of allowing any witness to be competent and not also compellable. Should this policy be held to be bad, however, then, though the reasons may favour making a party a competent witness, yet they must not be given effect to because of reasons against his being made compellable. Whether that policy be good or bad—and we think it bad—need not here be considered; for the only reason we have just now to deal with against making the party both competent and compellable, is derived from the principle that he should not be put in a position to criminate himself. Now of this we must say, that it is a principle of doubtful expediency. We have long passed the age of torture to force confession. But why should a man not be asked, on his oath, whether he committed a crime? It is hard for a wretch to lose the chance of escape from punishment which a trial affords; but on what principle is he to be commiserated if he does so? We ask him now—‘Guilty, or not guilty?’ We take his plea of guilty when he has the grace to give it; and when he hasn't, and adds a lie to his crime—a lie which, through effect of custom, we never reprobate—we try him in due form. If he is not guilty, there is no possible reason why he should not be examined; if he is guilty, and will tell the truth, surely it is as good and reasonable as a plea—no worse; if he does not tell the truth, are we not quick enough to see the lying and the perjury, and convict him on the mendacious inconsistency of his statement? So far as an objection is urgeable against making him a witness from the liability to perjury, it falls to be separately considered. But now we have but to notice that, if innocent, he will have the better chance of escape; if guilty, society will have the greater security for his conviction. In point

of fact, in most countries the accused is a witness—either on oath or not. With us he is a witness, whose deposition—not on oath—is read as evidence—against him, but not in his favour; and the opinions of several of the greatest thinkers favour the view that he should be regularly examinable. But much of all this is inapplicable to the present case; or, if applicable, must be held to apply universally to witnesses who may have an interest adverse to the truth, or who, being sworn, shall be obliged to tell things to their own discredit and disgrace. Adultery—a most grievous offence against morality—has ceased to be a crime. It is no longer punishable as such. It is in the same category with, though perhaps at the head of, the, alas! too long array of delinquencies whose punishment is public odium, proportioned to the public opinion of their heinousness. There is nothing absolutely to distinguish it from any other form of moral offence. If, then, a party, on the principle that one should not be compellable to criminate himself, is not to be competent and compellable as a witness in a divorce case, why should *he* be compellable to be a witness who has not merely failed to pay his debt, but denied it; who has slandered his neighbour; who has swindled his creditors (and who, now on oath, depones before the judge how he did it, with all the outs and ins of his extravagance, recklessness, and dishonesty); who has not only committed fornication, but meanly refused aliment to his child? Adultery is not a *tertium quid*—more than a moral delinquency, less than a crime—that it should be thus distinguished and made exceptional. We conclude, then, that, so far as the first reason for excluding the parties goes, it is untenable. It affects, in any case, but one of the parties; it affects the other only in the case of guilt; and to give effect to it in that case is inexpedient. It would be admitting a principle which naturally extends itself to the parties in almost every species of litigation; and we are not going back to barbarism, but emerging from it.

2. *The parties in divorce cases, if made witnesses, would be under strong temptation to commit perjury.*—This singular argument turns on the notion that it ought to be the policy of the law rather to exclude evidence, than expose witnesses to temptation to commit perjury. Now this neither is, nor ought it to be, the policy of the law. Perjury is a crime; evidence is a condition of justice; the policy of the law is, and ought to be, to admit evidence and punish perjury. A conflict must arise in the minds of suitors, in every

species of action, between their desire and obligation to tell the simple truth, and their desire and interest to tell something else. The pursuer desires to make out his case, and the defender to break it down. That is the very meaning of the *litis-contestation*. Therefore, if there is anything in this reason for excluding parties in divorce cases from giving evidence, it would apply to exclude the parties from giving evidence in every other kind of action. But that parties are admitted to give evidence in almost every other kind of action, shows that the general policy of the law is against the reason, and lays on those who put the reason forward the *onus* of establishing some essential difference between actions for divorce and other actions. What is the difference? One difference we can see; but it appears to make for our contention. An action for divorce is exceptional in this respect, that it is the only action, almost, in which the defender can be conceived to have a common interest with the pursuer in decree being obtained. No one can be suspected of contending before a judge that he does not owe so much money, wishing all the while that he should be saddled with the debt. But in divorce cases, the Court is naturally anxious to guard against collusion—a difficult business indeed, in the absence of the parties. Few would collusively attempt a case for divorce, if liable to be put through their facings in the witness-box; able as they now are to make the attempt without personally appearing, we know they are not few who make it. Those who do, are, of course, very abandoned—probably very miserable, as they are certainly unscrupulous. But if they wish to loosen a tie, the sacredness of which society's deepest interests oblige it to preserve, let them come face to face with society; and if they lie, let them be punished. Another difference between divorce and other cases, may be said to lie in the grounds of action as affecting character. But really, in this respect, there is nothing to distinguish it from many painful actions of damage for slander. In these, let the slander be what it may, parties are competent witnesses—temptation to perjury notwithstanding, and although, in a case where the *veritas* is pleaded, the issue may be the very same that falls to be adjudicated upon in a case for divorce. Also, it is notorious that in no class of actions is the proportion of the undefended to the defended so high as in actions for divorce. Either there is something hopelessly rotten in the character, so that the less said the better; or when one of the parties has resolved on breaking the marriage tie, the other, seeing an end

of all hope of happiness in the union, is only too ready to quit it. The fact is, for one case of divorce defended with a view to save character, there are a hundred where appearance is made solely with a view to patrimonial interest. No doubt, cases occur of innocence seeking to free itself from the foulest imputations ; but who dare say that in such a case the party ought to be excluded from giving evidence, any more than in an action of damage, where there is a plea of *veritas* ? If any case could be conceived stronger than another for the adoption of every means of elucidating the truth, it is this very case.

There is nothing, then, to distinguish divorce cases from other actions, so as to require a departure from the general policy of the law, to admit evidence and punish perjury. The temptation to commit perjury exists in every case where the party is a witness. In very many it is as great as in divorce cases, and in all it is of the same order.

One word before leaving this subject on the crime of perjury. There is none which should be branded with greater infamy ; and, alas ! we are told that there is none that is more common ; while, alas ! again, there is none that is so rarely punished. The sacredness of an oath is overlooked in the impunity of false swearing. No one can listen to judges used to sit in small debt courts expatiating on the prevalence of perjury, without seriously reflecting on the condition to which society must fall, if vigorous means be not adopted to increase the respect for truth. There is reason to fear that our population is rapidly becoming Indian in this regard. What the causes of this may be, we are not now going to inquire. But it is clear that the judge must not hold himself blameless who allows a case of apparent perjury to pass without thorough investigation. The causes which are operating to undermine the respect for truth, and the sacredness of oaths, would receive a check were this duty rigorously discharged, and, until it is, the prevention of the increase of perjury is hopeless. Perjury is to be prevented, like every other crime, by punishments ; and punishments, to be effectual, must be certain.

To exclude evidence for fear of perjury, is a policy without parallel. Were the State to abolish property because it tended to produce thieves, or offices of trust for fear of embezzlements, it would be carrying out the error in principle which lies at the root of this policy to its legitimate results. On every settled principle of legislation and jurisprudence it is indefensible.

3. *Humane feeling forbids placing in the witness-box persons to speak to their own shame in such a case.*—We sympathize with those who propound this objection. It is kindly, and just not Christian, because not wise. What the objector fancies when he urges it, is the case of some poor woman—young, of good family it may be, beautiful, but whom circumstances and misplaced affection have brought to shame. He conceives her led sobbing to the witness-box, and his heart is moved for her, poor thing! His reason is overpowered by his feelings, and he denounces the rule which drags her there as barbarous and inhumane. It is the ordeal—the rack. Maranatha!

Now, such a case is deeply affecting. It is not frequent; but it has occurred, and will occur again. All other possible cases are nothing to it. What a pity that it must be reasoned about! What a pity that it is so difficult to reason where one's heart is so much touched! One's sympathies, in crowds, block up the way of reason—eager for an argument in their favour—longing to bring him over blindfolded to their side. Logic, however, a strange, quiet fellow, and shy of such company, clears the path, and prevents their gratification, if it cannot be conceded in the way of truth and justice.

General rules must not be formed on view of exceptional cases; and the one considered is, thank God, exceptional. The exceptional cases may justly evoke our pity, if in them the operation of the general rules produce misery. But they must not lead us to forego general rules calculated to secure the public advantage. In the present case, what is of the first importance is, that the order of society be vindicated, the sacredness of the marriage vows maintained, and the instinct of family kept pure and holy. A society in which the cementing principle of domestic love is slackened, wants that prime quality which distinguishes our social aggregates from flocks and herds.

Now, these results are not to be obtained by a general rule which shall not work painfully in individual cases. So far as the rule decreeing divorce for adultery is concerned, it is all that is now left in the law to mark its sense of marital infidelity. It acts both in the way of remedy and punishment: of remedy to the party wronged by the misconduct; of punishment, by taking the charge of infidelity out of the mouth of rumour, authoritatively decreeing its

truth, and exposing as a fair object for public odium the doer of the wrong. The function of the courts of law, in such cases, is of the very first importance ; and what facilitates its performance, and, more particularly, what may be necessary for it in certain cases, is of importance too. If, on the whole, it be for the advantage of the courts in this function that the parties be made witnesses, then, on that general consideration, parties *should* be made witnesses, unless another general consideration, recognisable by law, can be made to cross and overcome it. Can any such be stated ? If not, we must be content to extend, in the exceptional case, our commiseration to the unhappy creature in the witness-box, and go out of Court with the feeling that on the whole justice is being done.

We are not so chary of human feeling in other fields, as to entitle us to forego a useful general rule of law on such an account. We not only have actions of adultery, but actions of filiation and aliment, daily in our courts. In these actions, every one knows what are the circumstances to which women appear to depone—women, though not of the higher classes—still women, and mostly the victims of circumstances and misplaced affection too—young, good-looking, and what not. Poor things ! Were they considered, when they were made competent and compellable witnesses ? Did the old law consider the woman's feelings—the old law with its oath in supplement ? It considered what was of more consequence, that the woman must get justice. And though the women in such cases are not ladies, are the men not sometimes gentlemen—so called ? And should not their feelings have been consulted before making them witnesses, competent and compellable ? No doubt, your gentleman may arrange the little claim out of Court, and thus escape exposure. But is this a consideration for the Legislature ? Certainly not. No one could seriously state such a reason as having character or weight to affect legislation, and no one dare now propose legislation for classes—one rule for the rich, another for the poor. But to keep a useful general rule out of law, as regards divorces, on such a reason as stands at the head of these remarks, considering what its rules are in cases of filiation, is an act—so far as it may be supposed to proceed on this reason—an act of class legislation. We do not say that it is an act proceeding on such a reason, but there are many who would justify it on this view.

It is sometimes very hard to do justice. In the class of cases before us, it is often very painful. But, *fiat justitia, ruat cælum*. The hard-

ness and the pain must be put up with. In proportion as they are likely to be great in any case, the fear of them will tend to deter men and women from entering on a course of conduct that must end in their being endured. And as they are certain to be more terrible in the case of persons of sensibility and refinement, so will the fear of them operate most powerfully on such persons as a check to misconduct.

4. *A reason derived from consideration of decrees of divorce as affecting personal status.*—We cannot state what this reason is ; for, although we have heard it more than once urged against making parties witnesses in divorce cases, we have never known it to assume any other form than that, ‘as divorces affect status, therefore,’ etc. As we can see nothing whatever in it, we shall say little about it. In proportion as questions of personal status are important, one would naturally think it would be important that they should be well settled ; and to be well settled, they should be adjudicated on the best evidence,—that is, on all the pertinent evidence readily obtainable. Unless, then, it can be shown, that to examine the parties would not only not facilitate the ascertainment of the truth in this class of cases, but would render it more difficult, no argument against their examination can be maintained. But it would be simply absurd to say that the examination of parties could render the truth more obscure, when, in fact, in all other cases it is found an advantage.

We have now briefly examined the various objections, so far as we know them, to the admissibility of parties as witnesses in actions of divorce. With what success we have met them, it is for the reader to judge. It need hardly be said, that they are stronger than can be urged against the admission of parties as witnesses in any other form of judicial inquiry. If we are right, the sooner a change is made in the law the better ; and we trust soon to see a change, if not to the full extent to which our argument would lead, at least to some extent in the direction which it indicates. We are not a generation of sophomores, to continue in the belief that the qualities of a body may be better studied by the aid of telescopes from a distance than near at hand, when it can be touched and tested. Nor do we require to be taught (to take the matter from another point of view) the trite truth, that the best evidence may often be obtained from the worst sources—a fact which, in every branch of scientific inquiry, is of daily observation. It is anomalous, therefore, that the law of evidence should, in an age impregnated with the

spirit of inductive science, be what it is; but law preserves the form and spirit of the past longer than any other expression of social life. It changes, however, with all others, though in their rear—never in intimate harmony with advanced opinion, but never slow to accommodate itself thereto, whenever its provisions become clearly inconformable with the requirements of reason.

J. F. M'L.

NOTES IN THE INNER HOUSE.

FIRST DIVISION.

Adv.—M'Coll v. Simons.

„ *Miller v. Henderson.*

„ *Reid v. Meux & Co.*

EPIGRAM on the *ratio decidendi* of certain judgments of the Sheriff Court of Lanarkshire.¹

We had first the case of the Smack,
And then the case of the Cow,
And lastly comes the Bottled Stout,
Which we are advising now.

Sir Archy was wrong in the first,
Sir Archy was wrong in the second,
And now 'tis clear that in the third
Equally wrong he's reckoned.

Now leeze me on Sir Archibald,
Who gives us the work to do—
The learned knight, who can ne'er be right,
Be it Ship, or Beer, or Co.

SECOND DIVISION.

Liability of a Law Agent.

M'Dougall or M'Call v. M'Laren or Sharp.

A PETITION for the appointment of a *curator bonis* to a man upwards of seventy years of age, accompanied with the usual medical certificates of incapacity, was presented to the Court by one of his next of

¹ 'In the above cases, which were of no public interest, the Court, after hearing counsel, recalled the judgments of the Sheriff of Lanarkshire, and adhered in each case to the judgment of the Sheriff-substitute. In the case of Miller, which was an action of damages for injury to the person, the Court expressed a hope that the defender would not press for expenses.'—*Vide Newspaper Report*. The following lines were picked up by the editor not a long way from the bench of the First Division.

kin, and was opposed by his daughter as unnecessary, in respect that he was capable of managing his affairs. A remit was, in consequence, made to a medical man, who, after examination, reported that the old man was 'quite unfit to manage his own affairs, from want of memory and weakness of mind.' After the medical report had been received, a minute was lodged, bearing to be at the instance of the old man himself, which stated that, though his memory was somewhat impaired from old age, he was of sound mind, and fully capable of managing his own affairs; that he had been hurried from home in severe weather, under threats of compulsion, to undergo the above medical examination, and was thus confused and excited; and that he was willing to appear at the bar, or submit to a medical examination conducted in an orderly manner. The party who acted as agent for the alleged lunatic in putting in this minute, and who held a signed mandate from him for so doing, had acted throughout, and was then acting, in opposing the petition for his daughter, who, while this procedure was going on, was a competing claimant with her father for the fund in an action of multiplepoinding then in dependence. Answers, denying the statements in the minute, having been lodged, a remit was made to the Sheriff-substitute of Perthshire to take proof as to these statements, and as to the alleged lunatic's condition. The Sheriff-substitute, after taking proof, reported that the statements as to the circumstances under which the previous examination had been made were unfounded; and that the old man, though once a person of shrewd observation, was now incapable of managing his affairs. In respect of this report, a *curator bonis* was appointed. Considerable expense having been incurred in consequence of this opposition at the instance of the alleged lunatic, a motion was made by the petitioner to the Court, to find the agent personally liable in the expenses so incurred. Lords Cowan and Benholme gave effect to the motion, holding the opposition to have been, in the circumstances, unjustifiable. Lord Benholme made an observation to the effect that he could not suppose the protection of the old man was the object of the opposition; and he could see another object, namely, to sustain and support the case of the daughter. The daughter had a personal motive in view; and it would be sad indeed if this poor old man, incapable of managing his own affairs, should have his estate squandered by persons who had not his interests in view, but objects of their own.

However painful the hardship that would have resulted from an

opposite decision,—however sad it might be that the savings of this poor old man, unable to protect himself, should be squandered in litigation, and he in his old age and imbecility consigned to a poor-house,—we cannot assent to a decision which, while it carries with it our sympathies, is unsupported by legal principle. The Lord Justice-Clerk, who dissented, put the case in its true legal aspect, when he said, The whole question turned upon this : Was there a mandate upon which the agent acted, and upon which he was entitled to act ? In all agency it was a clear rule, that a party professing to act *factorio nomine*, who had not authority to bind his principal, bound himself. If the agent here had a client whom he was entitled to bind, he bound his client, not himself, *secus* if he had not a client to bind. If, at the time he accepted the mandate, he was aware that the old man was incapable of giving a mandate, or that it was obtained by fraud or improper means, his Lordship would hold that there was no mandate, and that the agent was himself *dominus litis*. But the old man was not in law incapable of giving a mandate ; he was then *sui juris*. No doubt, if he had been a born idiot, or an idiot through supervening idiocy, his Lordship would have held in fact, as well as in law, although he had neither been cognosced, nor had a curator appointed to him, that he was incapable of granting a mandate. But this old man was only labouring under a certain amount of senile imbecility, and was not in such a state as to make everything he did a nullity ; and there was no evidence that the mandate had been obtained through fraud or its equivalent on the agent's part, or with his knowledge.

The opinion of the Lord Justice-Clerk contains a clear and sound statement of the legal principles applicable to the motion before the Court, which was a motion not at the instance of the lunatic himself, but at the instance of the opposite party. The point at issue was not, whether the agent's motive in carrying on the litigation was improper and corrupt, but whether he was to be held *dominus litis*, and as such responsible for the expenses. The question of an agent's liability to his client for conducting a litigation from improper motives did not properly arise upon the motion ; and although it would be a most dangerous and unjust doctrine to hold that a person in the circumstances of the alleged lunatic was not entitled to grant a mandate to defend himself, or that an agent was disabled from conducting a defence in his name, it would be quite as unsafe and inexpedient to hold, that, even where such a mandate had been obtained, the agent

should not be responsible *to his client* for expenses clearly proved to have been incurred, not for the client's interest, but in furtherance of some ulterior end, and from some improper and corrupt motive. The Judges in the majority seem to have confounded two questions which are sufficiently distinct,—the question of an agent's liability to his client for improper litigation, and that of his liability to the opposite party for expenses; and the Lord Justice-Clerk—although he said, with reference to the question before him, that the Court had very little to do with motive, or *bona fides* or *mala fides*, on the part of the agent—cannot be held to have regarded inquiry upon these heads as irrelevant in a question between agent and client, more especially where the client was in the position of the old man on whose behalf this application was presented.

THE MONTH.

Competency of Small Debt Appeals at the Defender's Instance.—At the last autumn Perth Circuit a case was decided which deserves the serious attention of the profession; because, if it is to form a precedent for future practice, the statutory provisions regarding appeals to the Court of Justiciary will be rendered completely nugatory in the class of cases in which the right is most necessary and useful, namely, appeals at the instance of the *defender*. In the case we refer to (*Baxter v. Kennedy*, 11 Sept. 1861, 34 Jurist 1), an appeal was taken from the Small Debt Court at Forfar, on the ground of incompetency, including want of jurisdiction. The appellant produced a copy of the entry of decree in the Court-book, as subscribed by the Sheriff. But it was objected that there was no process, as the only decree was that written out on the summons, according to the schedule annexed to the statute, and subscribed by the Clerk. Lord Deas (Lord Neaves concurring) held that the production of the extended decree was essential to the appeal, and that 'therefore there was no need to go further with the case.'

The effect of this decision, as has been said, is effectually to repeal the statute giving an appeal to the Circuit, on 'deviations in point of form, or on incompetency, including defect of jurisdiction.' An appeal on these grounds can only be on the part of the *defender*. The pursuer may still enjoy his right of appeal on the *magniloquent* grounds of 'corruption, malice, and oppression.' But

all redress is denied the defender: he cannot be heard until he produce the summons and decree against himself. These he cannot possibly obtain. The Clerk, at his peril, could not give these writs to the defender: they are the sole property of the pursuer. He, in the first instance, carries away the summons signed by the Clerk. So soon as decree is pronounced, he demands it to be written out, and he pockets it. In vain may the defender appeal, it matters not on what grounds. It may be he is not within the jurisdiction of the Sheriff, and that he was never summoned and never heard, and that the whole proceeding is a mere farce and mockery of justice. He may as well appeal to the Pope at Rome as to the Circuit, unless he complies with an impossibility. There is not the remedy, as in the ordinary Court, of compelling return of a record by coercion of a 'process caption.' He is quite at the mercy of the pursuer, who may coolly pocket the decree, and snap his fingers in derision both at the defender and the court of appeal. The pursuer all the time, with the summons in his possession, gravely enters appearance in the appeal court, and pleads '*no process*.' The plea is sustained, with costs; and straightway the decree, however grossly informal, is put into execution against the person or property of the unfortunate defender.

When the recent extension of the jurisdiction of the Small Debt Courts to cases of L.12 is considered, the vast sums of money daily adjudicated on in these courts in a manner the most dispatchful, with the check of law agency anxiously excluded, there exists every argument for an extension of the right of appeal rather than its virtual abolition as against the defender, if the cited decision is in future to be held the rule. In short, there will exist a palpable wrong without any possible remedy or redress.

Adjustment of Issues—The Western Bank Case.—It is now some years since we found it necessary to bring prominently under the notice of the profession an abuse of the forms of procedure in the Court of Session, which had already drawn down upon the practice of the law in Edinburgh not a little unreasonable obloquy from a class who are unable to distinguish between the substance and the accidents of our system. We refer to a practice, which then threatened to become general, of forcing jury cases to an issue of relevancy before the issue of fact had been tried, or had even been adjusted. At that time we ventured to assume (and the event did not falsify

the prediction) that the remedy for this *mala praxis* lay with the Court. To the firmness of the Judges of the Inner House, and more especially to the First Division (who uniformly sent back Reclaiming Notes against interlocutors allowing issues, to the Outer House), we owe the suppression of the old system of double debates, first on relevancy, and afterwards on the form of the issues. The innovation we refer to was not very favourably received by the leading practitioners and counsel; but, after two years' experience of the working of the present system, it will be admitted by all that the opportunities for debate are still amply sufficient to enable the parties to raise every question capable of affecting the issue of the case.

At the present time we are threatened with a revival of the double hearing in the Inner House: such, at least, will be the result if the Western Bank case is to form a precedent in similar circumstances. We refer to the proceedings in that case, because it exemplifies a form of practice which we believe to be erroneous; and it can scarcely be necessary to premise that the use we make of the Western Bank case as an illustration, is quite compatible with a scrupulous abstention from all comment upon the merits of the important question under discussion in that action.

In November and December 1861, the case was fully—we may say exhaustively—debated, with reference to the interlocutor of the Lord Ordinary reporting the issues to the Second Division. The defenders pressed for a dismissal of the action on various grounds, with which at present we are not concerned. But, in a separate branch of their argument, they objected to the form of the pursuers' issues as not being within the Record. For several weeks the debate was maintained with much ability; and such was the careful and detailed exposition and analysis of the averments, that it is indeed scarcely possible to figure a case in which the Court would be more completely in possession of the materials upon which their judgment was to be founded.

In disposing of an argument upon issues, it seldom happens that the choice of the Court is reduced to a simple alternative. On the contrary, it is just as practicable in this as in any other class of questions to adopt a middle course, neither dismissing the action nor affirming the relevancy of all that the pursuer proposes to put in issue. When this is the result to which the opinions of the Court tend, we think it would be satisfactory to the litigating parties to

be informed by the judges whose function it is to decide it, what in their opinion is the proper issue for the trial of the case. But in the Western Bank discussion their Lordships did not give the desired information. They merely disallowed the issues proposed by the pursuers, and allowed the argument to be renewed.

Now, it was impossible for the Judges of the Second Division to affirm, as they did, that the pursuers' issues were not adapted for the trial of the cause, without having previously considered the whole Record with a view to the determination of the form of the issues. For, suppose that any portion of it had been passed over without consideration, then it could not be affirmed with certainty, that within this unexplored territory there might not lurk matters of averment sufficient to support the rejected issues. The disallowance of the proposed issues implies, therefore, in the mind of the disallowing judge, a just appreciation of the import of the pursuers' averments, and an accurate perception of their legal bearings. To this extent, and no less, he must be master of the case, before he can determine what is *not* the appropriate issue of fact; and it is self-evident that the same amount of study and reflection will suffice for the determination of the positive question, What is the appropriate issue?

We assume, of course, that a pursuer who is doubtful as to the success of his issues, will come prepared to suggest an alternative form, and to support it, if desired, in his argument; and we have an equally clear opinion as to the perfect propriety of the course that is sometimes taken, of suggesting the elements of new issues to the parties, and allowing counsel to supplement their arguments before a final decision is pronounced. But merely to reject the issues actually tendered, leaving the pursuer—unassisted by any positive expression of opinion on the relevancy—to remodel his issues on the mere chance of obviating objections which are not disclosed, appears to us to be a mode of progression alike circuitous and uncertain. The Court has the power of framing and stating in an interlocutor suitable issues for the trial of any case brought before it in competent form. The power is given by the introductory section of the Jury Court Act of 1815, and has never been taken away. We know that a wish has been expressed by many of the leaders in the profession, that the Divisions of the Court would assume the responsibility of adjusting issues at their own hands, after hearing counsel. Of the reasonableness of this desire we entertain no doubt; and we trust that the 'tentative' system, which consumes so much valuable

time, and devolves upon the professional adviser so weighty a responsibility, may ere long be supplanted by the more rational method of direct decision.

The late Sheriff Logan.—The lamented death of this able, true-hearted, and genial man, which took place on the 2d of February, has left a blank in the professional society of Edinburgh which will not be filled up in our time. In one phase of his character Mr Logan was a representative man,—a man of a race who are nearly now extinct,—the masculine humorists of the old Scotch type, with which Cockburn and Robertson, and other eminent names of the past half century, are associated. Mr Logan, differing from these choice spirits as they differed in many qualities from one another, was certainly, as a wit, not inferior to either of them; yet it is but justice to his memory to say, that he took but little pride in those brilliant qualities of mind that made him at once the centre and the ornament of every circle in which he moved, and wished rather to be known as the painstaking and successful lawyer, the scholar, and the critic,—in all which capacities he might have gained distinction, had it not been that his more superficial qualities obscured the lustre of his solid acquirements. The following just and discriminating remarks upon Mr Logan's professional career are extracted from the columns of a daily contemporary :—

‘Mr Logan was the eldest son of the Rev. J. Logan, Relief minister of St Ninians. From an early period he gave rare promise of a brilliant career, which has only partially been fulfilled. Mr Logan had not attained to that position at the bar, or to that influence in the country, to which he might have aspired, for many reasons which cannot be set forth here. Something probably was owing to his natural constitution, but a great deal more to the fact that he did not belong to the select circle who usually receive official rewards, and are rapidly pushed upwards in their profession. Devotedly attached to his party—to the old Whig branch of the Liberals—they had not the grace to bestow upon him the reward to which he was entitled by his services to the cause, not less than by his undoubtedly great and varied talents. When he was at length made Advocate-Depute, and shortly thereafter Sheriff of Forfarshire, it was only when his promotion could in decency no longer be deferred. In power of mind, and extent of general knowledge, Mr Logan was superior to not a few of those who passed him in the race and obtained higher appointments. His party's ingratitude was not atoned for by his influence with the public, for, somehow or other, he had allowed a great opportunity of being a leader to slip from his grasp. The son of a Dissenting minister, his natural post was a leader of Dissenters; and had he cared to sympathize more with the views, feelings, and policy of the class from which he sprung, he would have wielded more political influence, and have secured the gratitude and attachment of a large portion of his countrymen. Mr Logan, however, chose to lay himself out for more purely professional distinction, and he attained to a very considerable practice at the bar; but nothing compared to what his great ability entitled him

to expect. In hearing him plead, or address a jury for a criminal, we have often been amazed at the aptness of his language, and the real power of his argument. He got the reputation of being too much given to the habit of extracting food for wit from his cases; but we have seldom, indeed, heard him so indulge, unless when it was infinitely better for his client that he should do so. His humour was racy and original, and he was the only man at the bar who could in the smallest degree be compared to the wits of a departed age. Take an instance which occurred very recently. He was defending the cause of a widow who had been apparently harshly treated by some relatives. The Judges of the First Division were inclined to recommend a compromise, and Lord Ivory suggested to Mr Logan that his side should feel the pulse of their opponents, to ascertain upon what terms the case could be adjusted. "My Lord," instantly replied Mr Logan, "there can be no pulse where there is no *heart*." Instances of this kind could be multiplied to an endless extent, from the memory of his friends. In the affairs of the city Mr Logan took a warm interest, having acted for several years as a Town Councillor. No doubt this offended the sensibilities of one class, who might have been his employers, and who, being destitute of public spirit themselves, frown upon any one who ventures to exhibit such an unforensic characteristic. It is many years since Jameson was untimely quenched; and now Logan, while scarce past his prime, is removed. They were names both honoured in the same circle; and he who has just gone will not be less sincerely mourned than the other.'

The vacant Sheriffship has been filled by the appointment of Mr F. L. Maitland Heriot, a gentleman much respected by his brethren of the bar; and who, although he has not attained the same professional eminence as his predecessor, will, we have no doubt, discharge the duties of Sheriff with efficiency and success. Mr A. Moncreiff succeeds Mr Heriot as Advocate-Depute.

Court of Session and Sheriff Courts.—A return has just been laid before Parliament, showing the litigated causes finally decided in the Court of Session during the year 1860, with the number of causes in the Sheriff Courts at Glasgow, Perth, Ayr, and Aberdeen, excluding small debt causes, and the total number of small debt causes (not being decrees in absence) decided in each Sheriff Court in Scotland during 1860. From the return it appears that the total number of litigated causes finally decided in the Court of Session in 1860 was 583, that number being exclusive of judgments only disposing finally of a part of a cause, but not finally exhausting the cause. The number of causes finally decided in the Sheriff Courts embraced in the return were as follows:—Glasgow, 390; Perth, 100; Ayr, 67; Aberdeen, 128. In the Small Debt Courts in Scotland, the total number of causes (not being decrees in absence) decided in 1860, was 17,331, of which 8367, or nearly the half of the entire number, were decided in the county of Lanark; the next highest number was decided in Edin-

burgh Sheriff Court, which disposed of 1003 small debt causes; and the following are the numbers for the courts which have the largest number of cases:—Renfrew, 676; Forfar, 655; Aberdeen, 650; Ayr, 618; Perth, 588; Dumbarton, 447; Stirling, 439; and Fife, 427.

If evidence were wanting to prove the utter groundlessness of the clamour that has been got up in interested quarters for an extension of the jurisdiction of the Sheriff Courts, the evidence is furnished by this return. *Seventeen thousand* decrees *in foro* by the Small Debt Courts, as against 583 final decisions of the Court of Session! Even in the class of cases in which the Sheriff's jurisdiction is co-extensive with the Court, as regards the value of the actions competent before him, it appears that the entire business of the Court of Session is equalled by that of the three largest County Courts, viz., those of Lanark, Perth, and Aberdeen.

These statistics demonstrate, what in legal circles is known to be the fact, that the Sheriff Courts have already engrossed the whole civil business of Scotland, with the exception of the more important class of questions, relating to heritable property, actions of divorce, and jury cases. It may or may not be desirable to maintain, as one of the institutions of the country, a Supreme Court of Judicature, whose decisions shall bind inferior courts, and give uniformity and symmetry to our consuetudinary law; but if these are objects worth securing, then we hesitate not to say that they will be put in jeopardy by any further extension of the Sheriff's jurisdiction. Already the jurisdiction of the Sheriff is greatly more extensive than that of the more highly paid English County Court Judges. If we are to have a Supreme Court, certain functions must be assigned to it, either appellate, or of original jurisdiction. The Sheriff's Court Bill of last year, and which it is proposed to reintroduce, aimed at a curtailment of both branches of this jurisdiction; and if the principle of curtailment be admitted, it is not difficult to foretell the result.

We gather from Mr Caird's last address to his constituents, that he is now alive to the real objects of the promoters of the Bill of last session, which he was induced to take under his protection; and we trust that the publication of these statistics will convince him that no real necessity exists for interference in that direction. What we really want is a *good and cheap form of appeal from the Sheriff Court to the Court of Session*. In England this is managed by very

simple machinery. The local court,—be it Quarter Sessions, Magistrate's Court, or County Court,—signs a case, *stating the facts* which raise the question of law upon which the opinion of a superior court is desired, and upon this case counsel are heard. The form applies to civil cases under L.50 only, for this simple reason, that in England *all actions above the value of L.50 must be brought, in the first instance, before one of the superior courts*. If our friends in the country are willing to adopt the English system in its entirety, by all means let them have it; but it is scarcely fair to advocate, under the name of 'assimilation,' a basis of jurisdiction which, if extended to England, would extinguish, at one sweep, more than half the business of Westminster Hall.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

ALEXANDER v. CLARK AND BARNET.—*Jan. 24.*

Partnership—Liability.

In 1853, the pursuer, Robert Alexander, residing at Hermitage, Helensburgh, and the defenders, John Clark, printer, Alexandria Works, Dumbartonshire, and James Barnet, residing in Glasgow, were the partners of a firm of Robert Alexander and Co., which carried on business as turkey-red dyers and calico-printers at Alexandria Works. In that year, Alexander retired from the concern, the defenders engaging to pay him an annuity of L.200 a year 'during such period as he shall survive; and they or their successors in the works and business shall carry on the same.' The annuity was regularly paid till Martinmas 1859. In 1860, the defenders sold the works and machinery to John Orr Ewing and Co., who now carry on the business as turkey-red dyers and calico-printers there. The defenders having declined to pay the annuity to the pursuer, on the ground that the concern of which they were partners was dissolved, and had ceased to carry on business since 3d January 1860, the present action was raised by the pursuer to compel payment thereof. The Court, adhering to the interlocutor of the Lord Ordinary (Mackenzie), held that the fact that the defenders had dissolved their concern and retired from business, has not liberated them from their obligation to pay the annuity to the pursuer; because John Orr Ewing and Co. have purchased the whole stock and subjects belonging to them, and are 'their successors in the works and business' in the sense of the agreement. They, therefore, decided in favour of the pursuer, with expenses.

Adv., MACINTOSH v. ANDERSON.—Jan. 24.

Aliment—Evidence.

This was an advocacy of an interlocutor of the Sheriff of Aberdeenshire, finding that the advocator was the father of an illegitimate child, of which Anderson was delivered in September 1860. It was proved that the parties had been together about fifteen months before the birth of the child; but there was no evidence, except that of Anderson herself, that the parties had been afterwards seen in company. She did not communicate the fact of her pregnancy to the defender until within two months of the birth of the child. Macintosh, on being informed of the charge, denied that he was the father, or that he had ever had connection with Anderson; but shortly after the communication had been made to him, Anderson stated that he had offered her L.20, 'to give the child' to some one else.

The Lord President said that it was the narrowest case he remembered; but that, upon the whole, he did not consider that there were sufficient grounds for overturning the judgment of the Sheriff.

The other Judges concurred, Lords Ivory and Deas remarking, that they held a stronger opinion than the Lord President, that the pursuer's case was proved.

Pet., ANDREW MARSHALL TO BE ADMITTED N. P.—Jan. 30.

Notary Public—Oath.

Andrew Marshall, writer, Linlithgow, applied to the Court to be admitted notary public; but in respect of alleged conscientious objections, he declined to take the oath *de fidei administratione*, but asked to be allowed to take in lieu thereof an affirmation *de fidei*. By a Scotch Act passed in Queen Mary's time, 1563, c. 79, notaries are obliged to take the oath *de fidei*. The applicant, however, maintained that under the 18 Vict., c. 25, and 21 and 22 Vict., c. 48, he was entitled 'to make a solemn affirmation or declaration in lieu thereof.' A written minute embodying the applicant's argument was given in, and the whole judges were consulted on the point.

At advising, the Lord President stated that in the opinion of the whole Court, subject to certain doubts of one or two of the judges, the statute of Mary is imperative, and the statutes of Victoria do not relax it. The Court, therefore, refused to dispense with the petitioner's taking the oath *de fidei*.

Pet., HAINES FOR RECALL OF SHAW'S SEQUESTRATION.—Jan. 31.

Bankruptcy—Recall of Sequestration.

James Shaw, designing himself 'surgeon, residing at West Port House, Linlithgow, and formerly residing at 104, Camden Road Villas, London, with concurrence of George Shaw, designing himself Esquire of Barneparks, Teignmouth, in the county of Devon,' on 23d November 1860, presented a petition for sequestration of his estates to the Lord Ordinary on the Bills, who awarded sequestration accordingly. Haines and Harrison, and other creditors of the bankrupt, immediately presented a petition for recall of the sequestration under the Bankruptcy Amendment Act of 1860, sec. 2, which provides for the recall of a sequestration, when the majority of the creditors in number and value reside in England

or Ireland, and that from the situation of the bankrupt, his estate and effects ought to be distributed among the creditors, under the bankrupt laws of England or Ireland. The Lord Ordinary recalled the sequestration, on the ground that a majority of the creditors in number and value resided in England; and that, having regard to all the circumstances of the case, the estate of the bankrupt should be distributed according to the bankruptcy laws of England. The bankrupt having reclaimed, the Court adhered, on the ground that the immense majority of the creditors in value were in England; that the bankrupt had come down to Scotland under peculiar circumstances, and very speedily obtained sequestration; and it was therefore proper that his estate, if he had any, should be distributed in England.

MATHESON v. THE MARCHIONESS OF STAFFORD.—*Feb. 1.*

Process—Teinds.

In this case, the Court held that a summons of valuation of teinds must be signed by the Clerk of the Court of Teinds, the signature of a Writer to the Signet being insufficient. The pursuer's counsel endeavoured to obtain from the Court an opinion, as to whether a summons of valuation of teinds should be in the new form introduced by 13 and 14 Vict., c. 36; but the Court declined to give it.

WATSON v. BURNET.—*Feb. 7.*

Master and Servant—Privilege.

This was an action of damages for alleged slander at the instance of a servant against her master. It was stated on record that the defender dismissed the pursuer for certain alleged improprieties of conduct, and that when her relations made inquiry of him he told them the reasons for her dismissal. The Court now held that such communications by the master were privileged, and that no action of damages founded on them could be maintained unless 'malice' were libelled. Their Lordships farther held, that the word 'malice' is indispensable, that no equivalent for it can be received, and that it is so completely of the essence of the action that it cannot be inserted after the record is closed.

Adv., **M'KELLAR v. SCOTT.**—*Feb. 7.*

Aliment—Process.

This was an action for aliment of an illegitimate child. The Court held that it was still competent to appoint the alleged father of an illegitimate child to be judicially examined; that if he fail to appear for examination he may be held as confessed on the fact of intercourse; that the pursuer's oath in supplement may then be taken, which, if satisfactory, will make out the case against the defender. Lord Deas was inclined to think that, under the recent Evidence Act, when a party is cited as a witness and fails to appear, he may be held as confessed; but that it was unnecessary to decide the point in the present case, because the defender's conduct in declining to appear was sufficient corroboration of the pursuer's oath.

DONALD v. DONALD.—*Feb. 7.*

Divorce—Aliment.

This was an action for aliment at the instance of the wife of William

Donald, late shoemaker, Aberdeen, against her husband. It would appear that Donald has succeeded to an income of about L.650. Some time ago, aliment at the rate of L.75 per annum was allowed to the wife. She now asked it to be increased to L.200. There are four actions of divorce, on the ground of adultery, depending between these parties, three of them at the instance of the wife. Upwards of L.1000, it was stated, has been already paid by Donald to his wife's agent to account of her expenses, and the litigations in all have cost above L.3000.

The Lord President asked if it was true that that expenditure had been incurred in actions of divorce between a shoemaker and his wife? It was at one time considered a scandal to the administration of justice in Scotland that divorces could be obtained too cheap. That scandal was certainly removed.* The Court awarded L.120 of aliment.

M.P., BAIKIE'S TRUSTEES.—Feb. 14.

Power of Appointment—Trust.

The claimants were Mrs Oxley and Mrs Cowan, the two daughters of Mrs Dover; and the fund in dispute was a sum of L.2000, under a bond of provision by Robert Baikie of Tankerness, to trustees for Mrs Dover's behoof in liferent and her children in fee, with a power to Mrs Dover to divide the same between or among her children in such proportions as she should direct and appoint. There was also in the bond of provision a term of payment, viz., 'majority or marriage;' but it was not plain whether this applied to the case of an apportionment being made, or to the case of Mrs Dover not exercising the power. She did exercise the power, and by an English deed gave Mrs Oxley (who was well provided for by her husband) L.5 down, and the liferent of L.1000; and to Mrs Cowan L.995, and the fee of the L.1000 liferented by Mrs Oxley,—Mrs Cowan's pecuniary circumstances being much inferior to Mrs Oxley's. The Lord Ordinary (Jerviswoode) held that Mrs Dover's deed of appointment was *ultra vires* of the granter, and that she had no power to deal with the L.2000 otherwise than so as that it should be payable at *majority or marriage*.

The Lord President, at advising, held that the direction in Mr Baikie's bond of provision was to hold a *capital sum* for behoof of Mrs Dover in liferent and her children in fee, and that the fee (a capital sum) was payable at a specified term; and that Mrs Dover having given Mrs Oxley's proportion chiefly in the shape of a liferent, she had exceeded the powers given to her, and the whole matter must fall, as if there had been no apportionment.

Lords Curriehill and Ivory concurred, the former remarking, that it was still undecided in Scotland whether a party, having a power of apportioning a fund, could restrict any of the parties to a liferent at all.

Lord Deas dissented and stated, that he should have much wished the whole Court had been consulted, as important and undecided questions were involved in the case; and he indicated an opinion that, looking to

* The following *mot pour rire* is worth preserving:—The question having been asked,—How would this shoemaker have got justice if he had been obliged to 'stick to his last?' The Lord President.—'He would have required to have spent his *awl*.'

the pecuniary circumstances of the claimants, the apportionment in Mrs Oxley's favour was sufficient.

The Lord Ordinary's interlocutor, giving one-half of the whole fund to each of the claimants, was therefore affirmed by a majority of three to one.

HORNEL v. GORDON.—*Feb. 19.*

Process—Diligence.

The issues in this case having been adjusted before the Lord Ordinary, a motion was made to-day in the Inner House for a diligence to recover documents necessary for the trial. The Court were of opinion that the motion should be made before the Lord Ordinary, the case remaining before him, both for trial and for all purposes connected therewith.

MACBRYDE v. PAUL.—*Feb. 19.*

Process—Division and Sale.

In this case the Court held that an action of division and sale of heritable property is an Outer House process, and that the Lord Ordinary does not require to make great avizandum with it to the Court.

SECOND DIVISION.

SCOTT v. ROBERTSON.—*Jan. 24.*

Maritime—Registration—Issues.

The pursuer avers that a contract was entered into between him and the defender, by which it was agreed that the ship 'Helen' should be sold to the pursuer at the price of L.175, payable by bill at six months; that an insurance should be effected on the vessel during the currency of the bill, at the pursuer's expense, but in the defender's name; that the bill being granted, the vessel, with her certificate of registry, should be delivered to the pursuer; and that a regular bill of sale should be executed in the pursuer's favour when the sum in the bill was paid. He claims damages, and asks an issue on each of the three following grounds:—1. That after delivery of the vessel and certificate, the defender wrongfully obtained and retained possession of the certificate of registry, and thereby prevented the pursuer from obtaining possession of the vessel. 2. That in July or August 1860, when the pursuer was in the lawful possession of the vessel, the defender wrongfully took possession of it. 3. In respect that, after the pursuer had reacquired possession, and her master and crew had abandoned her, and she had fallen into the hands of the Receiver of Wrecks at Liverpool, the defender had prevented her being delivered over to the pursuer by falsely, wrongously, and in contravention of the contract, stating that he was the party having right to her, and claiming that she should be delivered up to him. The defender contended that the statements on record were too vague and inexplicit, and, with reference to the third issue, that it was not made clear whether the proceedings before the Receiver were judicial or not; and, if judicial, that malice and want of probable cause was essential to the pursuer's case. The Court held that the case was relevant in all its branches, and adjusted an issue on each of the three heads. With reference to the third objection, the Lord Justice-Clerk said that the Receiver of Wrecks was an officer under the Board of Trade, who had no judicial functions or discretion as to the disposal of the ship in such a case, the object of his possession being to

take charge of the vessel for behoof of the true owner. The pursuer's averment was, that the vessel had been retained from him by the Receiver on account of the defender having claimed it in contravention of the contract, and that damage had been suffered in consequence. This was a relevant averment.

Pet., A. B. AND OTHERS.—Jan. 24.

Power to Advance—Nobile Officium.

This petition was presented by the trustees under an ante-nuptial marriage contract, to obtain authority to advance to the surviving widow L.200 out of trust funds, in repayment of the expense of board and education supplied by her to the children of the marriage, and also to pay certain sums to two of the sons, and a payment to a daughter annually for four years, the said sums to be expended at the sight of the trustees, in the maintenance and education of the said parties.

The whole funds in the hands of the trustees had come to them from the wife under a conveyance from her (in the marriage contract), which contained a reservation allowing her to uplift L.800, to be applied as she should think proper, provided that, in the event of there being no children or of the whole children predeceasing the survivor of the spouses, the whole funds should be conveyed to the survivor; and that, in the event of there being children at the death of the surviving spouse, the conveyance should be to the child or children so surviving.

The Court held that as the right of the children depended on their surviving the widow, they had no vested interest in any part of the fund, and might never have any. It could not be known whether one or more would survive; in the event of one surviving, he would be entitled to the entire fund, and the Court had no right to apply it for the benefit of the others. The equitable powers of the Court did not allow them to alter provisions in trust deeds. The application was therefore refused.

CRAWFORD, NOW PETRIE (INSPECTOR OF EAGLESHAM), v. BEATTIE (INSPECTOR OF BARONY).—Jan. 24.

Poor-Law—Settlement—Expenses.

The pauper in this case was born in Eaglesham. Prior to September 1851, he had resided about ten years in the parish of Barony, and had acquired a residential settlement there. In September 1851, he removed to the parish of Wishaw, and never returned to the Barony parish. In August 1854 he became insane, and was removed to Gartnavel Asylum, in the parish of Govan. In July 1856 he became an object of parochial relief, and did receive relief from the parish of Govan. The question before the Court is, whether his residential settlement in the Barony parish was lost. The Lord Ordinary (Kinloch), on the authority of the case of *Melville v. Flockhart*, held that the settlement had been in the circumstances retained, notwithstanding the pauper's absence from the Barony parish. The Second Division, in respect of the decision of the First Division in *Melville v. Flockhart*, and the importance of the question, appointed the case to be laid before the other Judges.

The Lord President, who delivered the leading opinion, held that the settlement which John Biggar had in the Barony parish of Glasgow was a settlement acquired by residence, and was therefore defeasible by sub-

sequent non-residence for the period prescribed by the 76th section of the statute, as interpreted by decision. In 1851 he left the Barony parish, and went to reside in another parish, where he had been appointed to a pastoral charge. He never returned to the Barony parish; and more than the statutory period elapsed before he became an object of parochial relief. That, either from accident or design, he did not in the interval acquire any settlement by residence elsewhere was immaterial. That during the latter part of the time which elapsed after he left the Barony parish he was afflicted with insanity, or any other ailment which did not then render him chargeable, was equally immaterial. Whether supervening insanity might be an obstacle to the acquisition of a residential settlement in the parish where the insanity occurred, is a question altogether different, and with which, in the present case, the Barony parish had no concern. The full period of time prescribed by the statute having elapsed betwixt the date of Biggar's migration and the date of his becoming chargeable, the only question in which the Barony parish can, under the 76th section of the statute, have an interest was, whether, during that interval, he did or did not reside in the Barony parish continuously for at least one year? Certainly he could not be held to have resided in the Barony parish continuously during the first or the second year of his continuous absence from it—he was then living at Wishaw as the resident pastor of a congregation there, and apparently without any intention of removing from thence. As little could he be held to have resided in the Barony parish continuously during any of the subsequent years of his continuous absence from it, unless an attack of insanity, while residing in the parish of Wishaw, could be held to have been a resumption of his abandoned residence in the Barony parish—a proposition for which there was neither authority nor principle.

Lords Ardmillan, Curriehill, Neaves, Mackenzie, and Jerviswoode, concurred with the Lord President.

Lords Deas and Ivory were of opinion that the interlocutor of the Lord Ordinary should be adhered to.

At advising, the Lords of the Second Division having concurred in the opinions of the majority of the consulted Judges, the Court, in conformity with the opinion of the majority, altered the Lord Ordinary's interlocutor, and assoilzied the defender.

It was submitted that as this judgment overturned the previous decisions, the pursuer should not be found liable in expenses.

The Court took the point to avizandum.

OTIS v. KIDSTON.—*Jan. 31.*

Maritime—Salvage—Merchant Shipping Act, 1854, sec. 468.

G. W. Otis, master of the ship 'Thalatta,' of Bath, State of Maine, presently lying in the harbour of Greenock, presented a petition to the Lord Ordinary on the Bills, under the 468th section of the Merchant Shipping Act, 1854, to fix the amount of security to be given by the petitioner in order to obtain the release of the vessel, now detained by the Receiver of Wrecks in consequence of an alleged claim of salvage. The petition set forth that the vessel, having sailed with a general cargo of merchandise from Glasgow for Melbourne, had encountered heavy weather, and made some water. The master then thought it prudent to put back to

Greenock for repairs. In doing so he passed the Mull of Kintyre at seven A.M. on 14th December 1861, and about two P.M. a squall split the main-topsail and jib, but the vessel was then perfectly manageable. The 'Tuskar,' a steamer, then came up, and the master, being anxious to get to Greenock, offered L.50 to the 'Tuskar' to tug the vessel to it. The 'Tuskar' then took the vessel in tow, but it soon became evident that the steamer had not sufficient power. The 'Thalatta' soon found that she was being towed down to the leeward, and that she would have been better without the steamer. Afterwards the 'Flying Dutchman,' a steam-tug, came and demanded L.200 to tow the vessel to Greenock, but the petitioner refused to give this, and the tug went away. She again returned; and the petitioner seeing that the 'Tuskar' had taken him into danger, and could not take him out of it, offered L.100 to the master of the 'Flying Dutchman,' and at last, as the master of the 'Flying Dutchman' said the ship would be on shore in half an hour if he did not take his assistance, a bargain was struck for L.150. The 'Flying Dutchman' then brought the 'Thalatta' safely to Greenock, and the L.150 was paid. The 'Tuskar' now claimed L.10,000 for salvage.

The owner, master, and seamen of the 'Tuskar' lodged answers, in which they set forth that the 'Thalatta' would have been wrecked if it had not been for the assistance rendered by the 'Tuskar.'

The Lord Ordinary was of opinion that the position to which the 'Thalatta' had been brought by the 'Tuskar' was one more dangerous than that in which it found it, and that even assuming that the 'Tuskar' had rendered valuable services, the 'Flying Dutchman' had mainly contributed to the safety of the vessel. In this view, the 'Tuskar' would not be entitled to more than a third of the salvage, and in any view, if the petitioner found caution for L.1500, it was amply sufficient to cover any claim the respondents might have. The Lord Ordinary authorized the vessel to be delivered up on this caution being found.

The respondents having reclaimed, it was contended on the other side that the Lord Ordinary's judgment was final.

The Court were of opinion that the right of the parties to bring the decision of the Lord Ordinary on the Bills under review, could not be taken away by implication, and that right was not expressly taken away by the regulating enactment (sec. 468). On the merits, they held that the Lord Ordinary's estimate was a fair approximation to the value of the services rendered, which there was no reason to disturb.

BEATTIE v. GEMMEL.—Feb. 4.

Lunacy Act—Exclusion of Review.

This was an appeal to the Glasgow Circuit from the Small Debt Court, which had been certified to the High Court of Justiciary, and afterwards remitted to this Court as being purely civil. Gemmel, the Procurator-fiscal of Lanarkshire, the respondent, had obtained a decree against the appellant Beattie, the inspector of the Barony parish, for the expense of maintaining a lunatic, who, it was said, 'had been taken in and sent from' his parish. Various questions in regard to the interpretation of the Lunacy Act were raised and discussed; but the Court, without giving any opinion as to whether the Sheriff was right or wrong in the result at which he had arrived, held that the present appeal was barred by the

special provisions of the Small Debt Act, and was therefore incompetent.

GORDON'S TRUSTEES v. LORD FIFE'S EXECUTOR.—Feb. 5.

Repetition—Resulting Trust.

The present action was brought by the trustees of the late Francis Gordon of Craig and Kincardine, advocate in Aberdeen, to recover L.675 as the price paid by him for the superiority of the lands of Knockinch, which he had bought for the late Earl of Fife, under deduction of L.210 which he had received in a process of ranking and sale at the instance of the creditors of the Earl. The defender denied liability, on the ground that the purchase had been made by Mr Gordon on his own account, and the disposition taken in his own name, and pleaded that the proceedings in the ranking and sale did not import any admission of liability on the part of Lord Fife. The Court held that certain holograph letters of Lord Fife, together with the proceedings in the ranking and sale, sufficiently proved the mandate to Mr Gordon, and gave decree to the pursuers.

BELL v. ANDERSON.—Feb. 7.

Process—Notice of Trial—13 and 14 Vict., cap. 36, sec. 41.

In this case issues were adjusted on 14th January. The pursuer gave notice of trial for the sittings in March, on 23d January. The defender then moved the Lord Ordinary on 1st February to fix a day for trial before himself during session, in terms of the 41st section of 13th and 14th Vict., c. 36. The pursuer objected to the motion as incompetent, in respect that the cause was in the Inner House. The defender then presented a note to this Division to have the process retransmitted. The Court held that the proper form was to make the motion in the Outer House; and then, there being a conflict between the pursuer's notice of trial and the defender's motion, the Lord Ordinary should report to the Division.

The Lord Ordinary (Ardmillan) having subsequently reported the case, the defender, in support of his motion, urged the short nature of the case, and the delay which would arise from waiting for the sittings. The Court held that the pursuer was entitled to the lead, and so to fix the time and place of trial. It lay upon the defender to show cause why the pursuer's notice of trial should be set aside. The pursuer had carried on the case without any delay.

BELL v. OGILVIE.—Feb. 7.

Process—Reponing—Expenses.

The present action was brought by James Bell, S.S.C., against William Ogilvie, ropemaker in Aberdeen, for payment of accounts for professional business done, and advances made, on behalf of the defender. The defender admitted his liability for outlay only.

On 2d July 1861, the Lord Ordinary appointed the pursuer to revise his condescendence. On 14th January 1862, the Lord Ordinary allowed the revised condescendence to be received, but it was not lodged; and on 21st January, his Lordship refused to receive it, and closed the record on summons and defences.

The pursuer reclaimed.

The Lord Justice-Clerk said that the pursuer's counsel having stated that the revised condescendence contained statements material to the pursuer's case, he would allow it to be received, but only on condition of paying the whole previous expenses of the cause.

The other Judges concurred.

Div., JACK AND MANDATORY v. JACK.—Feb. 7.

Divorce—Jurisdiction—Domicile.

In this action of divorce, the defender pleaded that she was not subject to the jurisdiction of the Scottish Courts, her legal domicile being in the United States.

The action was brought by a husband against his wife on the ground of adultery, alleged to have been committed by her in Scotland. The marriage took place in June 1853, when both parties were domiciled in Scotland. From that date they resided in Scotland, cohabiting as married persons, till July 1855, when the pursuer, who is a native of Scotland, withdrew from the society of the defender, and leaving her in this country, subject to the jurisdiction of its courts, went himself to America, where he has since remained, for the purpose, as alleged in defence, of avoiding the society of the defender. The defender having been left by her husband in this country, continued constantly to reside here, and was still personally resident within the territory of the jurisdiction of this Court at the time the action was raised.

The Lord Ordinary sustained the jurisdiction.

On a reclaiming note, the Judges of the Second Division, in respect of the importance of the question of jurisdiction raised, ordered cases to be laid before the whole Judges, who returned opinions to the following effect:—

The Lord President, Lord Ivory, and Lord Curriehill:—In the circumstances, we hold, that in July 1855, the established domicile of the married pair, as such, was, and had always been, in Scotland; and that it has never been transferred to any other country, either *animo* or *facto*. In July 1855, this Court was not only a competent court, but was the only court of competent jurisdiction to entertain an action for dissolution of the marriage. We think it is competent to do so still. Nothing is alleged to have occurred to displace its jurisdiction, except the single fact of the husband having personally withdrawn to America, but withdrawn in the circumstances already referred to, the wife having continued to reside in this country as still her only home. The general rule that the domicile of the wife follows that of the husband, is not absolute, universal, or invariable, and it has never been applied to such a case as the present. It is truly inapplicable to such a case. The husband here did not transfer, or attempt or intend to transfer, to any other country, the home or domicile of the married pair, which had been established in this country, and which, being in this country, made the Court of this country the proper forum for trying any action to be brought for dissolution of the marriage. In that respect the state of matters continued unaltered, with the acquiescence of both parties, until the present action was raised. Our opinion in the third plea of the defender, and in favour of the jurisdiction of this Court as a competent forum for the trial of this action for dissolution of the marriage, rests, therefore, upon these grounds:—1st, That

the domicile of the married pair, as such, was in this country, and nowhere else, from the time of their marriage, in June 1853, until the departure of the husband in July 1855; 2d, That it has never been transferred from this country to any other country, either *animo* or *facto*; and, 3d, That the defender, having been left intentionally by the pursuer in this country, and subject to the jurisdiction of this Court, has with his acquiescence continued all along to reside within the territory of that jurisdiction, and was so resident when the action was instituted against her.

Lord Deas could not concur in the Lord Ordinary's judgment. He thought that a proof before answer as to the domicile should be allowed, or, if proof were renounced, the action should be dismissed.

Lords Neaves and Mackenzie were for adhering. They held that a Scotch Court had no jurisdiction to interpose to dissolve a marriage by divorce, unless, at the time when the remedy is sought, the parties are Scotch spouses connected with Scotland by some subsisting tie.

Lord Ardmillan, Lord Jerviswoode, and Lord Kinloch, concurred.

The Lord Justice-Clerk, at advising, said that he concurred with the majority in holding that the Court had jurisdiction to divorce the defender. The true foundation of jurisdiction in divorce was domicile, but it was not necessary that the husband should, at the date of raising the action, have within the territory of the Court his principal domicile for regulating his succession. If a domicile of succession had been necessary to sustain jurisdiction in the present case, he could not have held that it had been made out without proof; but this was quite irrelevant in the present case. What the law of Scotland requires is a matrimonial domicile by residence in the country for a certain period. That period is fixed at forty days. The wellbeing of society required that the law should regulate the conduct of all married persons living in the country. A matrimonial domicile in one country is not inconsistent with a domicile of succession in another; and though there cannot be two domiciles of succession, a party may have two matrimonial domiciles, as in the case of a Scotchman having an estate in England, who takes his wife and family with him to England for six months every year. In such a case there would be two homes. The home or matrimonial domicile was the place where the parties lived, or, if separate, where they would naturally come together. In this case, there could be no doubt that the home was in Scotland at the date of the alleged desertion of the husband. A husband's desertion did not change it.

Lords Cowan and Benholme having concurred with the majority, the Court adhered.

HOOKE v. HOOKE.—Feb. 7.

Divorce—Domicile—Jurisdiction.

In this case, which was an action of divorce by a husband against his wife, the defender pleaded that the courts of this country had no jurisdiction. The Court repelled the plea. The facts of the case on which the question was determined are sufficiently brought out in the opinion of

The Lord Justice-Clerk.—When this case was heard in the month of June last, it appeared to all of us that it depended so much on the same principle as the case of Jack against Jack, that it should not be disposed of till we had the opinions of our brethren in that case. That course has

been fully justified, and the light which has been thrown upon this case by the case of Jack will enable me to express my opinion very shortly. This is an action of divorce by a husband, in which the wife objects that this Court has no jurisdiction. The facts are shortly these:—The parties were married in Scotland in October 1840. Both were then domiciled in Scotland, where they cohabited until March 1841. After that the husband was obliged to go to India to join his regiment. He carried his wife with him to India, where they resided from 1842 to 1847. They both returned to Scotland, and lived in Argyleshire as man and wife, from 1848 to August 1850. A separation then took place. We don't know how that was brought about, but we know incidentally from productions in process that there was a deed of separation. From that year, till the institution of an action of divorce in 1852, they continued separate. From 1852 till 1859 or 1860, the husband was in India with his regiment, while the wife remained in the same part of Argyleshire where she had formerly lived with her husband. They thus continued in a state of separation. It appears that the husband came to London in 1860. This action was raised before he had returned to Scotland, but while he was in London on his way to Scotland. He seems to have returned to this country very shortly after the summons was raised. On these facts, I am of opinion that the Court have jurisdiction. The matrimonial domicile of the spouses was in Scotland at the date of the separation in 1850, and it seems to me that if the separation were at an end, and the spouses were to come together again, the place where they would naturally come to cohabit would be Scotland.

Lords Cowan and Benhelme concurred.

APPEALS IN THE HOUSE OF LORDS.

(Before LORD CHANCELLOR WESTBURY, Lords CRANWORTH and CHELMSFORD.)

MRS ISABELLA YOUNG OR RICHARDSON AND OTHERS, *Appellants*, v. LAURENCE ROBERTSON, ESQ., CASHIER OF THE ROYAL BANK OF SCOTLAND, AND OTHERS, TRUSTEES, AND OTHERS, *Respondents*.—Feb. 14.

Trust-Vesting—Effect of Liferent.

This was an appeal from a decision of the Second Division of the Court of Session, after consulting the other Judges, as to the construction of a trust-disposition and settlement.

The late James Donaldson, merchant in Glasgow, who died in 1844, left a trust-disposition and settlement whereby he disposed and assigned all his estate, heritable and moveable, to trustees on certain trusts. These were—First, for payment of his debts; secondly, payment to the widow of the whole rents and annual profits of the free residue; thirdly, conveyance of certain subjects to a certain person; fourthly, payment of certain legacies and annuities. The fifth purpose was as follows:—‘I will and direct the said trustees to account for, pay and divide, or convey (under the exception of so much, if any, of the foresaid L.2000, as may be tested upon by my said wife in manner foresaid) the whole residue and remainder

of my property, subjects, means, and estate, heritable and moveable, real and personal, or proceeds thereof, after the death of the last liver of me and my said wife, equally to and among John Macdougall, of the E.I.C.S. at Madras, William Macdougall, indigo planter at Calcutta, sons of my niece; and Mrs Young or Thomson, wife of Dr Thomson, physician, Perth; Mrs Young or Richardson, wife of Dr Richardson, surgeon, of the E.I.C.S., Bengal; and Eliza Young or Cuthbertson, wife of Allan Cuthbertson, accountant in Glasgow, all children of the late Mrs Elizabeth Donaldson or Young, equally, or share and share alike, and *to their respective heirs or assignees*, declaring that if any of said residuary legatees shall die without bearing lawful issue *before his or her share vest* in the party or parties so deceasing, the same shall belong to and be divided equally, or share and share alike, among the survivors of my said grand-nephews and grandnieces equally.'

By a codicil, the testator added a sixth residuary legatee—viz., Thomas Young, officer in the Bengal Native Infantry.

The testator died in 1844; his widow died in 1857; and between those dates two of the residuary legatees—viz., Thomas Young and William Macdougall—died. The question was, whether the respective shares of these two legatees had then vested, in which case Mrs Young and Lieutenant-Colonel Macdougall claimed the same respectively. The Lord Ordinary (Kinloch) held that the shares did not vest at the testator's death, but vested only at the widow's death, and, therefore, the executors of the predeceasing legatees were entitled to nothing. The other Judges having been consulted, they were divided as follows:—Lord President M'Neill, Lords Curriehill, Ivory, Deas, Neaves, Ardmillan, Mackenzie, Jerviswoode, and Cowan, held the shares vested at the death of the testator; while the Lord Justice-Clerk (Inglis), Lords Cowan and Kinloch, held that they did not vest till the widow's death.

The case having been argued at great length on appeal,

The Lord Chancellor said that the case had been argued at the bar in a very elaborate and able manner, and great attention and time had been given to it; but, considering the question involved, this was no more than was due to the subject, and to the difference of opinion that existed in the Court below. Now, on a matter of this kind it was desirable to consider what were the reasonable and established rules of construction applicable to wills, and in speaking of those rules it was the jurisprudence of both kingdoms that was to be considered; for though here the question was one as to the application of the law of Scotland, yet in the construction of the ordinary words of a will there was no difference whatever between the law of Scotland and of England. Now, it was a settled rule, and it was a most reasonable and natural one, that when words of survivorship were used in a will, and no period was specified, it was presumed that the period meant was that for the distribution of the funds. That undoubtedly was the rule established in England, and it appeared that the same rule had been established in Scotland even earlier than in England. Now the application of that rule would lead to this, that whenever a testator gave a sum, or the residue of his estate, to be paid among a number of persons, and he then referred to the contingency of one or more of those persons dying, and then he gave the same sum to the survivors, without saying at what period the survivorship was to be computed, then on that

simple gift those who survived the death of the testator were to take, because in that case the death of the testator would be the period of distribution. Again, by parity of reasoning, where the sum is given to a person for life, and after his death the sum is to be distributed among a class of persons or the survivors, the rule was, that as the period of distribution in that case would be the death of the *liferentrix*, then the survivorship was to be calculated at that date, and accordingly, until the death of the *liferentrix*, the shares did not vest in the surviving legatees. The period of distribution was thus the period for ascertaining who were the survivors intended to take. These were the natural and reasonable rules of interpretation; and, in applying them to this case, it may be asked—Were there any particular words in the context, or in the bequest itself, which defeated this natural construction? On reading the words, one could not help seeing on the very first consideration that they were nothing else but an expansion of the meaning which was held to be implied in the mere use of the word survivorship taken by itself. But legal ingenuity had been resorted to in order to give a recondite meaning to what would otherwise seem the natural and obvious interpretation. In the first place, the word ‘vest’ was seized upon and held to mean, not what it primarily and naturally means—viz., the vesting *in possession*; but it was held to mean the vesting of the mere interest or title. This contention was the mere child of legal ingenuity; it was the result of applying one’s knowledge of rules of law in order to put a legal refinement on words which were plain enough when taken in their ordinary popular meaning. That meaning was, that where a testator says, ‘before his or her share shall vest,’ he means, ‘before his or her share shall come into possession.’ A man of plain understanding, divested of legal ideas, and not wedded to a technical vocabulary, would have no difficulty in coming to this conclusion. Those words, therefore, did not in reality give to the clause any different interpretation from what it would have had without them. It was true there were some difficult words to construe in the clause of bequest—viz., the words ‘their heirs and assignees;’ but those words may have had some meaning in a contingency which has not happened, but which might have happened. Though, therefore, they were not entirely superfluous, yet they had no precise meaning in the events which had happened. On the whole, he (the Lord Chancellor) generally concurred in the just and appropriate judgment which had been delivered in this case by the Lord Justice-Clerk. The duty of a Court was to give to words their ordinary and natural meaning, and not to substitute for that meaning one which was secondary, technical, and artificial. The conclusion, therefore, was, that the opinion of the majority of the Judges must be reversed, and that of the minority upheld; and the order of the House would contain a declaration that no residuary legatee who died before the *liferentrix* took any share or part of this residuary estate.

Lord Cranworth said there had been much learned argument in this case; and if it had not been that the arguments at the bar had been so full and elaborate, their Lordships would have felt it due to the Court below to take longer time for consideration. But as their Lordships were all agreed upon the subject, there was now no reason for withholding their opinion, that the contention of the appellants was correct. The noble Lord on the woolsack had gone so fully into the case, that it was

unnecessary to enter further into the details, and he fully concurred in the proposed order of the House.

Lord Chelmsford concurred.

Judgment reversed.

JOHN LAWFORD YOUNG, *Appellant*, v. LAURENCE ROBERTSON AND OTHERS, *Respondents*.—Feb. 15.

Conditional Institution—Conditio si sine liberis.

This was a second appeal arising out of the same subject-matter as the previous appeal. One of the six residuary legatees—viz., Thomas Young—had predeceased the liferentrix, and he left a son, the present appellant, who claimed not only one of the six shares in right of his father, but also his share of the lapsed legacy of William Macdougall, another of the six original legatees, who died without leaving lawful issue. The first claim was founded on the doctrine that the son was conditional institute of his father, and the second claim was founded on the doctrine called the *conditio si sine liberis decesserit*. On this claim the Lord Ordinary (Kinloch) held that the first part of it was good, but not the second. The Second Division gave no opinion on the point. On appeal,

The Lord Chancellor said that, though it seemed to be settled that the issue in such a case would be entitled to the original legacy or share of the residue intended for the father, yet the Courts in Scotland had frequently said that this doctrine was not to be extended. Besides, the portion of the lapsed share of Macdougall accrued only to the survivors, and as the appellant here did not take as survivor, his second claim could not be sustained. The interlocutor of the Lord Ordinary would therefore be affirmed on that point; and considering the nature of the difficulties involved, the costs of all parties in this case would come out of the fund *in medio*.

Lords Cranworth and Chelmsford concurred.

Judgment partly affirmed.

English Cases.

LARCENY.—H. was sole manager of the business, and responsible for all monies coming into his possession, of an industrial society or partnership, in which he was a partner. He was likewise in possession of the shop in which the business was carried on. The prisoner also was a partner, entitled to share in the gains, and liable to the losses of the society. On one occasion, when he was assisting in the shop, the prisoner fraudulently abstracted some sovereigns from the till; and it was held he might be convicted of stealing the money on an indictment laying the property in H. alone. Pollock, C. B.: The case finds that H. was in possession of the shop, and had the sole management of the business, and was answerable for the safety of the property, and solely responsible for all the monies of the society that came into his possession. This case is very like, in principle, the case of the man who robbed his own servant of his own money.—(*R. v. Webster*, 31 L. J., M. Ca.)

MARKET.—A local act for establishing a market imposed a penalty on any person who sells at any place within the limits of the act other than in the market-place, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house. The General Markets and Fairs Clauses Act (10 and 11 Vict., c. 14), which was incorporated with such local act, except so far as it was not expressly varied by the local act, prohibits any one selling elsewhere than in the market, 'except in his own dwelling-place or shop.' It was held, that a sale in a shop attached to any dwelling-house is within the exemption of the local act, and protects the seller from the penalty, although the dwelling-house is not his, and although the sale be a sale by auction. But a vessel in a canal is not a dwelling-house or shop attached to or part of a dwelling-house within such exemption.—(*Wiltshire v. Willett*; 8, and *Wiltshire v. Baker*, 31 L. J., M. Ca. 10, n.)

PARTNERS.—It is no answer to an action for breach of an agreement to enter into partnership with plaintiff, to plead that, after the agreement, and before breach, defendant discovered that plaintiff had, before the making of the agreement, acted with fraud and dishonesty towards a former partner of plaintiff in the conduct of the partnership business, which had been carried on by plaintiff and such partner, and that such fraudulent and dishonest acts were unknown to defendant at the time of his entering into the said agreement. Erle, C. J. : If the plea had been more specific in its allegations, and had amounted to fraud practised on the *defendant*, it might have been sustained as an answer to the action. I am unwilling to bring in a new defence to an action of this kind.—(*Andrewes v. Garstin*, 31 L. J., C. P. 15.)

MONEY HAD AND RECEIVED.—A mortgagee who had agreed to assign his security on payment of principal, and interest, and costs, having made a claim for costs to which he was not entitled, an assignee on the mortgagee refusing to execute the assignment on any other terms, having by direction of the mortgagor paid the whole sum claimed under protest,—it was held, the mortgagor might recover the excess in an action for money had and received, not as money paid under duress in the strict legal sense of the term, but as a payment made involuntarily under undue pressure. It was held, also, the mortgagor was not estopped from setting up this claim by the recital in the assignment to which he was a party, that the whole sum paid was due for principal, interest, and costs; for that a recital, although an estoppel upon the parties to the deed, where the matter of the deed itself is in dispute, is not so in a matter which is collateral to the main object of the deed. Williams, J. : *Close v. Phipps* (7 M. and G. 586), and many other cases such as those relating to the payment of tolls under compulsion, establish conclusively, that when a demand is made by a mortgagee, who refuses to transfer unless his demand is satisfied, this, though not duress in the strict legal sense of the term, yet constitutes a state of circumstances under which the money so paid may be recovered back.—(*Fraser v. Pendlebury*, 31 L. J., C. P. 1.)

NEW TRIAL.—To an action claiming special damages for the non-delivery of goods within a reasonable time, defendants, admitting their negligence to have been the cause of the non-delivery, paid L.10 into court. The Judge at Nisi Prius left it to the jury to say whether the L.10 paid into court was a sufficient compensation for the pecuniary loss plaintiff had sustained, pointing out that the law did not entitle plaintiff to recover under some of the heads of his claim, and that on the evidence there was no pretence for saying that he had sustained any substantial loss. The jury having given a verdict for L.5 beyond the L.10 paid into court, it was held the amount of damages was a question for the jury, and had been properly left to them; and although the Court might think the verdict wrong, and L.10 enough, yet the damages recovered being less than L.20, the verdict could only be disturbed on the ground of its being perverse; and as the jury had not disobeyed any directions of the judge, the verdict could not be said to be perverse, and the Court could not interfere to disturb it. Bramwell,

B. : The verdict was not contrary to the direction of the judge, because the learned judge, as I think, properly left the amount to the jury ; accompanied, no doubt, with very strong remarks to keep them right, which unfortunately they did not adopt. On that ground we think the rule ought to be discharged.—(*Adams v. The Midland Railway Co.*, 31 L. J., Ex. 35.)

NUISANCE.—Liability for polluting the water of a river, though the pollution arise from a lawful trade, carried on in a proper manner ; and where to an action for carrying on a trade in such a manner as to cause injury to plaintiff, defendant relies for a defence upon the fact of the trade being carried on in a reasonable and proper manner, the onus of proving that it is so carried on is on defendant, and not on plaintiff of showing that it is not so carried on. Martin, B. : The defendants carried on the trade, no doubt, in a secondary degree for the benefit of the public, but primarily for their own benefit. The public are benefited by the carrying on of all trades whatever, for they have an interest in persons using their industry and capital. But that is no answer to a community whose water is poisoned by arsenic, by the persons carrying on that business.—(*The Stockport Waterworks Co. v. Potter*, 31 L. J., Ex. 9.)

POOR LAW.—A guardian, etc., of the poor knowingly supplying goods for any workhouse for profit, upon the verbal order of the master of the workhouse, renders himself liable to the penalty imposed by the 53 Geo. III., c. 137, sec. 6, as extended by the 4 and 5 Will. IV., c. 76, sec. 51, although the master was not expressly authorized by the guardians to make the purchase, as required by the orders of the Poor Law Commissioners.—(*Greenhow v. Parker*, 31 L. J., Ex. 4.)

INSURANCE AGAINST ACCIDENT.—By the deed of settlement of an insurance company, it was provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the company should be furnished by the claimant, of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim. *Held*, that the directors could only require reasonable evidence of death by accident, and were not entitled capriciously to withhold payment.—(*Braunstein v. The Accidental Death Insurance Co.*, 31 L. J., Q. B. 17.)

JURY, DISCHARGE OF.—On the trial of an information by the Attorney-General for bribery, a material witness for the prosecution refused to answer a question put to him ; and the judge, holding he was bound to answer it, adjudged him guilty of contempt ; and thereupon, and for no other reason, at the request of the counsel for the prosecution, the defendant objecting, the judge discharged the jury. The above facts having been entered on the record, the defendant moved for judgment *quod eat sine die*, and that all further proceedings on the information be stayed. The Court discharged the rule ; Wightman, J., Crompton, J., and Blackburn, J., on the ground that, assuming the discharge of the jury under the circumstances stated on the record to have been improper, the defendant was not entitled to judgment or to a stay of jury process ; Cockburn, C. J., inclining to the same opinion, but holding that, in a case of doubt, the Court ought not to interfere.—(*R. v. Charlesworth*, 31 L. J., M. L. 25.)

EMBEZZLEMENT.—Prisoner was a member of a duly certified friendly society. He was also paid secretary to the society. His duty, among other things, was to keep correct accounts of the receipts and expenditure of the society ; to receive the monies weekly from members, and to pay what was due from the society ; and weekly to place the balance in the society's box, which was left in the lodge-room. Having appropriated to his own use certain sums paid in by members, and omitted to enter them as received in the society's books, it was held he might be convicted of embezzling the money.—(*R. v. Proud*, 31 L. J., Ma. C. 71.)

SUCCESSION DUTY.—Mortgages executed by a tenant for life and remainder-

man, under a joint power of appointment are incumbrances created or incurred by the remainderman; and therefore he cannot, on the death of the tenant for life, deduct them from the value of his succession, the 'Succession Duty Act, 1853' (16 and 17 Vict., c. 51), s. 34, enacting that, 'in estimating the value of a succession, no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor.' Bramwell, B.: Without saying that provision ought not to be made to the contrary by the Legislature, or that it would be unfair to do so, I think the Crown has failed to prove that the charges were created or incurred by the petitioner within the meaning of the statute; and, consequently, that the appeal should be allowed. I express this opinion with considerable doubt; but I think our judgment in the *Attorney-General v. Banks* gives countenance to it.—(*In re Peyton*, 31 L. J., Ea. 50.)

PARLIAMENT—Borough Vote: Nature and Subject of Occupation.—Part of a house used for residence does not confer a qualification for a borough vote under the words 'house, warehouse, counting-house, shop, or other building,' of 2 Will. IV., c. 45, s. 27. In order that part of a house may be a 'house' within the meaning of 2 Will. IV., c. 45, s. 27, there must be actual severance of the part from the rest of the house. An occupier of a sufficient tenement may be qualified as tenant, although he may not have a key of the outer door, or may not have uncontrolled access to the tenement, or be free from any servitude or rights of entry reserved by the landlord, which affect only the value of the tenement.—(*Cook v. Humber*, 3 L. J., C. P. 54; *Wilson v. Roberts*, *ibid.*)

SALVAGE.—Where a derelict was found at sea by salvors, who were incapable of performing the attempted service, but remained by the wreck until a second set of salvors came up, who dispossessed these first and brought it into port, the Court allotted to the first set a sufficient sum to cover the expenses to which they had been put. Where the wreck had been greatly damaged by the erroneous conduct of the salvors in their treatment of it, the Court awarded them a smaller sum, deducting from the reward which it would have otherwise held that they had earned, a certain amount as compensation for the additional damage thus done to the property, and the Court proportioned the amount that it deducted to the want of skill shown.—(*The Magdalen*, 31 L. J., Pr. M. and Ad. 22.)

LANDS CLAUSES CONSOLIDATION ACT.—The expression 'such land' in the 94th section of the Lands Clauses Consolidation Act, 1845, referring to intersected lands, is not restricted to intersected lands situate in a town, but applies to all intersected lands, whether so situate or not.—(*The Eastern Counties and the London and Blackwall Rail. Cos. v. Marriage* (House of Lords), Ex. 31 L. J., Ex. Ap. 73.)

DEMURRAGE.—In an action for demurrage against the assignee of a bill of lading, where the vessel was detained at her port of discharge beyond the days for unloading allowed by the charter-party, the evidence was, that the bill of lading made the goods deliverable to the assignee on his paying freight according to charter-party; and that in the margin of such bill of lading was the following: 'There are eight working-days for unloading in London.' It was held, defendant was not liable, as there was no intimation in the bill of lading that the person receiving the goods thereunder was to pay demurrage. Erle, C. J.: I agree with the cases that have been cited, beginning with that of *Stinde v. Roberts*, 5 Dougl. and L. P. C. 460, that if the bill of lading contains a promise by the master to deliver the goods to the consignee on the performance of a condition, the consignee who claims under such a bill of lading the performance of the duty of the master to deliver the goods, impliedly promises to do all that the bill of lading says shall be done as a condition to the delivery of the goods. But, in the present case, I do not gather from the words in the margin of the bill of lading that there was any intimation that the assignee was to pay demurrage.—(*Chappell v. Comfort*, 31 L. J., C. P. 58.)

CONFIRMATION OF EXECUTOR.—The object of the 12th section of the Confirmation and Probate Act, 1858, is to render unnecessary a second application for probate. The interlocutor of the Commissary is not, therefore, conclusive evidence of domicile when that question is raised in the Court of Probate. When probate has been granted in common form, and a contest is discovered after it has been sealed, but before it has left the office, the Court will not allow it to be taken out of the registry. Sir C. Cresswell, after referring to the terms of the 12th and 17th sections of the statute: The interlocutor of the Commissary as to domicile is to be evidence for the purposes of this Act, and for those purposes only; that is, for the purpose of rendering another application for probate unnecessary. The Act does not say that the confirmation shall operate to determine questions in issue in this Court. I ought not to take any step which shall preclude me from inquiring into the matter. I shall be very glad to submit to the opinion of the Queen's Bench, if an application for a mandamus be made next term to that Court; but whatever I do, I shall try the cause, as I should not be justified in abstaining from trying issues joined before me. [The case having been afterwards arranged, the Court put its seal to the grant of probate.] —(*Hawarden v. Dunlop*, 31 L. J., Pr. and M. 17.)

CHARTER-PARTY.—A ship was chartered to proceed with a cargo from England 'to a safe port in Chili.' On her arrival off the coast of Chili, the charterers directed the captain to proceed to C, which was by nature a safe port, but which was then closed by the Chilian Government, and into which a ship entering without a permit would have been liable to confiscation. The ship was detained many days, until, the interdict being removed, a permit was procured. The charterers acted *bonâ fide* in naming C, and both they and the shipowner were ignorant, when they entered into the charter-party, that any of the ports of Chili were closed; but it was held, that, in naming a port which was then closed, the charterers had not named 'a safe port' within the terms of the charter-party, and they were, therefore, liable to the shipowner for a breach of the contract implied on their part, that they would name a safe port within a reasonable time. Wightman, J.: In ascertaining the proper meaning of the charter-party, I do not think the addition of 'safe' makes much difference. The port was safe as far as navigation went; but, on a reasonable construction of the charter-party, a port to be within its terms must be a port into which the vessel could enter at the time she was to sail there. I am therefore of opinion that the charterers are liable to the shipowner, and must pay damages for their default.—(*Ogden v. Graham*, 31 L. J., Q. B. 26.)

EVIDENCE.—The principle applicable to the admissibility in evidence of the declaration of deceased persons is the same, whether the declaration be against proprietary or pecuniary interest, and whether it be verbal or written; and a verbal declaration against proprietary interest is evidence not only of the particular fact which is against interest, but also of any other fact contained in the declaration and substantially connected with the same subject-matter. Therefore, a verbal statement by a deceased person, made while in the occupation of a tenement, that 'he occupies it as tenant, at a rent of L.20 a year,' is evidence, in an issue between strangers, not only of the fact of the tenancy, but also of the amount of rent; *e. g.*, it is evidence between two parishes, litigating the settlement of a descendant of the deceased, to prove that the deceased had acquired a settlement by renting a tenement at L.10 rent. Cockburn, C. J.: I am of opinion that a verbal declaration against proprietary interest is admissible as evidence of what have been called collateral facts contained in it, but what I would rather call the facts substantially forming part of it and not foreign to it.—(*R. v. The Churchwardens and Overseers of Birmingham*, 31 L. J., Ma. C. 63.)

THE

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THE VALUATION ACT.

(Continued from page 130.)

WE have now to consider the description of property assessable as lands and heritages. That expression is declared, in the interpretation clause, to 'extend to and include factories, and all buildings and pertinents thereof, and all machinery *fixed* or attached'—that is to say, attached in such a manner that the law would deem it a fixture. In one case, a party, charged L.90, 5s. for 'engine and engine-house,' craved that the assessment should be restricted to L.30—the value of the building—on the ground that the engine was a moveable subject, which might be taken to pieces and removed without detriment to the structure. The Commissioners gave effect to this view; but the judges held that the determination was wrong. (Case 17.)

The erections made by a tenant without any feudal title, and which will fall into the possession of the proprietor at the end of the lease, do not seem to be assessable under the Act. The Act is for the valuation of subjects held in property, not in possession; and from erections of the above description, the proprietor, pending the tenant's occupation, receives no benefit whatever. A croft belonging to Lord Lovat was let for 19 years at L.8, 10s.—the full annual value of the subjects at the time. The tenant, at his own expense, erected a house, which was used as a dwelling-house and a carpenter's shop. It was at first decided that, in such circumstances, the tenant was not the proprietor, and could not be entered as such,

because, although the term proprietor was defined as embracing 'liferenters, fiars, etc., or *other* persons who shall actually be in the receipt of the rents and profits of such lands and heritages,' the expression applied to a party, such as a liferent proprietor, legally entitled to the possession, and not a mere tenant for a limited term. It was then attempted to enter Lord Lovat as proprietor for the sum of L.8, 10s. (the amount of rent stipulated), *plus* the estimated annual value of the house erected by the tenant. The assessor maintained that the house being *in esse*, must belong to some one, and was actually Lord Lovat's; but his Lordship answered, that all he got for the subject was the rent at which it was *bona fide* let, and which must be held to be its fair annual value. The Commissioners reduced the valuation to L.8, 10s., being the full benefit derived by the landlord; and the judges held that they were right. (Case 29.) To the same effect is Case No. 2, holding that a sub-tenant in possession under an arrangement with the principal tenant, to which the landlord was no party, was a mere squatter; and that, if he chose to erect any subjects at his own cost, the Act made no provision for their valuation.

The result, however, would have been different if, in the case put, the lease had exceeded the term of 21 years. Where the stipulated duration of the lease is more than 21 years from the date of entry (or, in minerals, more than 31), the rent payable is not necessarily to be taken as the value, but the subjects are to be valued irrespective thereof; and the lessee is to be entered as proprietor, with right to deduct from his rent the proportion of taxes paid by him in respect of such entry, but which are truly due by the actual proprietor. In the case of Lord Lovat, therefore, if the lease had exceeded 21 years, the tenant would have been entered as proprietor for the full value of the subjects. It not unfrequently happens that a lease, *e.g.*, of a field of minerals, is sublet at a considerable increase of rent. In Case 23, for instance, certain minerals were let by the proprietor for 21 years at L.200, and were sublet at L.311, 3s. The proprietor was entered for the latter sum. On appeal, it was held that although the subrent was the real annual value, their worth to the appellant was only L.200, which was all he received for them; and that there was no authority for taxing him on the difference. The original lease being for less than 31 years, the surplus rents actually paid under the sublease were lost for assessable purposes.

In another coal case the rent was L.300, or, in the landlord's

option, certain lordships, which for the year preceding had actually been taken, and amounted to only L.188, 6s. 10d. The Commissioners directed that the owner should be entered at the latter sum; but the assessor appealed, on the ground that, as the landlord was not bound to accept of less than L.300, the fact of his indulging his tenants ought not to be taken into account. The judges held that the determination of the Commissioners was wrong. (Case 24.)

In the Case No. 27 it appeared that a granite quarry in the glebe of Kirkmabreck is worked by the Liverpool Dock Commissioners, who pay a lordship of 1s. a ton; 10 per cent. of the rent is paid over to the incumbent as a compensation for the annoyance occasioned by the works; and the remaining 90 per cent. is accumulated by a committee of heritors, who pay the interest of the fund to the minister. The heritors and Presbytery objected to the quarry being valued at all, as a glebe is an inalienable subject, and the tonnage is the price paid for a portion of the glebe carried away; or, if valued, it should be entered at no more than the 10 per cent. paid to the minister. The judges directed that, in the column 'Proprietor,' the heritors and Presbytery should be entered as holding in trust for the benefice of Kirkmabreck, and that the sum actually paid by the Dock Commissioners should be stated as the value.

It sometimes happens that, in order to escape the House Duty, a L.20 house is let at L.19 odd. If it appears that the sum is the full and fair rent of the premises, it will be entered as the value. (Case 20.) But where the tenant is taken bound to pay, for example, L.19, 5s. of rent, and also to insure the premises, the true rent is the sum stated, *plus* the cost of insurance; and the property should be so entered. (Case 28.) Where a furnished house is let, a deduction requires to be made from the rent equivalent to the value of the furniture, in order to ascertain the assessable value. (Case 3.)

The interpretation clause says that lands and heritages shall include 'shootings and deer forests where *actually let*, fishings, woods, copse, and underwood, from which *revenue is actually derived*.' The question at once occurs, What is the meaning of the expression, 'woods from which revenue is actually derived?' No land is absolutely without value; and does the fact of its being covered with plantation exempt it from assessment altogether? The first case which occurred on this point was of this nature. Mr and Mrs Murray Dunlop of Corsock were *inter alia* put down by the assessor

for 33 acres of young plantation, of from one to six years' growth, on land partly muir, partly pasture, and to a small extent arable. The woods yielded no revenue, and were not, in their then state, capable of yielding any in the shape of rent or otherwise. The assessor valued them at what they would let as pasture or grazing land, being an average of 6s. 7d. an acre. The proprietors objected, that they were worth nothing, and a kind of property appropriately set forth by its true specific denomination, but subject to a qualification, could not be classed under a more general designation, such as lands, in order to get quit of the qualification. The Commissioners gave effect to this view, but the decision was held to be wrong. (Case 4.)

Suppose, again, that a tenant of a country house, surrounded by woods, has right, 1st, to the shooting, and, 2d, to exclude the agricultural tenant, or any person in right of the proprietor, from pasturing the woods or cutting grass therein. In a case of this kind it was contended that the woods had no value as pasturage; but that, in fact, the agricultural value might be held as included in the sum paid for the privilege of killing the game. The Commissioners disallowed the valuation, on the ground that the proprietor had divested himself of the right to let the ground for pasturage, and the rent paid by the tenant covered the whole produce of the ground. The judges, however, held that the decision was wrong, and upheld the assessor's view, that the Act contemplates two different subjects—the value of the privilege of killing game, and the value of the woods for grazing in their natural state. Both values should enter the Roll. The shooting rent covers no right to the use of the land or its produce, but is an accidental incident of the possession, the worth of which fell to be added to the grazing value of the lands, as in agricultural rents, where not only the rent paid by the farmer is entered, but also the rent paid for the shootings. (Case 31.)

It would appear that the qualifying words in the clause referred to do not apply to fishings. They apply to copse and underwood only. Fishings are, therefore, treated differently from shootings, which require to be 'actually let.' It is difficult to see the ground of this distinction, unless it be that, in the Poor Law Act, fishings are included in lands and heritages, and Parliament were reluctant to take them out of the category to which they had been assigned. It follows that the proprietor of salmon fishings in a river bounding or passing through his property, is not entitled to plead that they

are worthless in respect of their not being let to a tenant at a yearly rent. When they are in the proprietor's hands, they fall to be valued at what they might be expected to let; and so it was determined by the judges, reversing the decision of the local Commissioners, in Case 32.

Such are the more important points settled under this new form of appeal. It is a signal illustration of the excellent working of an appeal on a case stated, which we hope to see soon extended to the Small Debt Court, as a check on irresponsible tyranny and caprice. To show the need of this species of review, we may add, that in the whole 35 cases the determination of the Commissioners was adjudged to be wrong or requiring variation in 18, and to be right in 17.

NOTES IN THE INNER HOUSE.

FIRST DIVISION.

Baird and Others v. The Magistrates of Dundee and Others.

IN 1639, Robert Johnston left L.1000 to the 'Provost and Bailies of Dundee, for the yearly maintenance of the aged and impotent people of said town of Dundee.' In 1646, the Provost, Magistrates, and Town Council of Dundee, into whose hands the legacy had *de facto* come, purchased with part of it the ground called Monorgan's Croft; and they took the title to that and other subjects purchased from said legacy, not in the name of the Provost and Bailies as Johnston's trustees, but in name of themselves and of the Hospital Master of Dundee, 'for the special use, behoof, utilitie, and profit of the poor of the said hospital.' It is admitted that the latter class of poor persons are different from those contemplated by Johnston's will. For more than two centuries, therefore, Johnston's legacy has been misappropriated; and the question raised in the present case is, whether that misappropriation shall now cease, or whether it has lasted so long that the law will support its continuation. The First Division, Lord Deas dissenting, have decided that all right to complain of the misappropriation has been cut off by the negative prescription; and their Lordships further indicated an opinion that the title to Monorgan's Croft has been rendered indefeasible by the positive prescription. The soundness of the judgment seems open to doubt. The way in which the majority of the Court dealt with

the first point was this :—They held that the question was not one of trust at all, but simply of title. They held that, rightly or wrongly, Johnston's Trust had been non-existent for more than two centuries, and that there were no trustees under it who could be called to account. The necessity for taking this ground was obvious. After the case of *Ramsay v. College of St Andrews*, 4 D. 1366, and the series of decisions on which it followed, it could not be maintained that any length of mal-administration by trustees would found a plea of prescription, as Lord Fullerton put it, 'that any lapse of time can sanction and secure the continuance of a violation of duty by the administration of a trust.' The majority, therefore, were driven to hold that the Provost, Magistrates, and Town Council of Dundee, who are the trustees of the Hospital of Dundee, are totally different persons from the Provost and Bailies of Dundee whom *umquhile* Robert Johnston named his trustees. The distinction is a very thin one; and we take leave to doubt whether, in the present case at all events, it is a sound or available one. It has now been settled by the judgment of the House of Lords (24 July 1861), that Monorgan's Croft was purchased with the money of Johnston's Trust, and that croft is now in the hands of the Provost, Magistrates, and Town Council of Dundee. How did they get it? Johnston gave his trustees no power to divest in favour of the hospital trustees. If the majority's view be sound, and the present defenders are not Johnston's trustees, it cannot perhaps be said that they have committed a *breach of trust*, but they have been guilty, in their corporate capacity, of what is no less unjustifiable, to wit, the crime of *theft*. We do not understand that they plead the prescription of crimes, and we do not see that any other is applicable to their case. The truth is, it is vain to distinguish in this matter between the Provost and Bailies of Dundee, and the Provost, Magistrates, and Town Council of Dundee. The best proof of their identity, indeed, is, that Johnston's legacy has all along been treated as a corporation trust. But we go further, and with all deference maintain, that, between contending claims under a charitable trust, there never can be room for the plea of prescription at all. The considerations which led to the passing of the Prescription Statutes, and the terms of these enactments themselves, are plainly inapplicable. It is always a question of trust, and not one of title. Long lapse of time and loss of documents may render it very difficult, or in some cases impossible, to ascertain the intentions of the truster. But when these can

be ascertained, as they admittedly have been in the present case, the Court is bound to find means for having them carried out. It is unnecessary to say, that when the rights of private individuals, strangers to the trust, conflict with those of the beneficiaries, the plea of prescription is perfectly competent. It comes, then, to be a question, not of trust, but of title. See Erskine iii. 7, § 35.

Thompson v. Whitehead.

This was an action at the instance of L. H. Thompson, lately one of the principal clerks of the House of Lords, now residing at Rosemount, Lasswade, against George Whitehead, tailor and habit maker, Change Alley, Cornhill, London. The pursuer has resided in Scotland since 1856. The defender is a domiciled Englishman. The pursuer avers that in September 1858 the defender assaulted and slandered him in the neighbourhood of Edinburgh. In January 1860 the defender instituted an action against the pursuer in the Court of Session for an alleged debt of L.51, 18s. 6d., for which he held a judgment of the Court of Queen's Bench in England. While this action was in dependence the pursuer raised the present action in the same Court, concluding for damages for the alleged assault and slander. To this action it was pleaded that the Court had no jurisdiction, the defender being a domiciled Englishman. The pursuer replied that the defender was subject to the jurisdiction *reconventionis*, the *actio conventionis* being the action instituted by the defender for L.51, 18s. 6d. The Lord Ordinary (Kinloch) repelled the plea; and, the pursuer having reclaimed, the First Division were equally divided in opinion. The case was, therefore, sent to the whole Court; and the consulted judges returned opinions, unanimously holding that the plea of reconvention was ill-founded.

It is not very easy to extract from the opinions what the combined view of their Lordships was on the real meaning and limits of the principle of reconvention. The Lord Justice-Clerk is the only judge who arrives at an exhaustive definition, which he expresses thus:—‘It is a rule devised entirely for the protection of a defender, and for the speedy determination of counter claims. The claims must either arise *in eodem negotio*, or be *ejusdem generis*; and the rule will apply only where the two claims, the *conventio* and the *reconventio*, may be tried simultaneously, and terminated by a single sentence, or by two sentences contemporaneous, or nearly contemporaneous.’ The Lord President, at the advising by the

First Division, expressly denied the soundness of this definition ; and stated that, in his opinion, 'whenever two cases arose out of claims, both of which resolved into pecuniary demands, the principle of reconvention applied between them.' Lord Neaves, and several judges who agreed with him, thought, wherever a foreigner sued a native in an action, the defence to which must proceed by way of action, the principle of reconvention would render the second action competent, and so in regard to two actions both arising *ex pari materia*. Perhaps, however, the principle, as recognised by the majority, was more accurately stated by Lord Deas, who said :— 'Reconvention depended entirely on implied consent. It went further than merely submitting the grounds of defence as well as of action to the judgment of the Court sued in. It implied that the foreigner suing in this Court consented to its jurisdiction in all relative actions, without which justice could not be done between him and the native defender.'

Petition—Andrew Marshall.

In this case the Court held that the statute of Queen Mary, 1563, c. 79, obliging notaries public to take the oath *de fidei administratione*, is imperative and still *in viridi observantia*, notwithstanding the provisions of 18 Vict., c. 25, and 21 & 22 Vict., c. 48, introducing affirmations and declarations instead of various oaths. It is more than probable that, when the attention of the Legislature is drawn to the decision, an Act will be passed enabling intending notaries with tender consciences to make affirmations *de fidei*.

SECOND DIVISION.

Counsel's Presumed Mandate.

Suspension—Young v. List and M'Hardie.

An action was raised in the Court of Session, in Young's name, against the respondents, in which, after the Record had been closed, decree of absolvitor, with expenses, was pronounced, in respect of no appearance being made for the pursuer at the debate. Young, being charged on the decree for payment of the expenses, brought this suspension on the ground that he did not authorize the action, and was not even aware of its existence till the charge was given. The Court unanimously refused to sustain this as a competent ground of suspension. It has been settled law from an early period,

that the appearance of counsel is a mandate, and that no party in the Court of Session is entitled to require production of the authority in virtue of which the advocate for his opponent (if within Scotland) appears; and it has been held in equity to follow from this, that the party for whom counsel professes to act, should, in the first instance at least, be bound by these actings in a question with his opponent. The practice of holding counsel's gown a sufficient mandate is stated by Spottiswood to have existed as early as 1627, and he is confirmed by our institutional writers and a series of authorities.—Stair (i. 12, 12); Bankton (i. 18, 7); Erskine (iii. 3, 33); *Ballantyne*, 7 December 1676, Dictionary, 348; Wallace, 31 May 1821. Notwithstanding the antiquity of this rule, it seems neither just nor expedient; it neither conduces to the interests of litigants nor to the dignity or safety of the legal profession. Counsel, receiving their instructions from the agent, cannot be in every case supposed to satisfy themselves that the action is really authorized by the party, and would feel themselves placed in a much more satisfactory position were a mandate from the client produced. Agents also would not be exposed to have their actings afterwards questioned; and would be secured from misconception of the nature of their employment, or destruction of its evidence, if in all cases, as a necessary step in the process, a mandate from the party were required.

It is difficult, on the other hand, to conceive what possible advantage can be derived by litigants from this presumption. If the action is really authorized by a party, it is surely no hardship to require him to state that such is the case in a probative and binding manner; and if it is not authorized by him, it seems most unjust, either that he should be liable for the expenses and bound by the result of a suit of which he was ignorant, or that, on the other hand, his opponent should be compelled to litigate with an imaginary party, and be exposed to the danger of having the whole procedure in the cause annulled, and of losing all the expenses he has incurred. This rule of presumed mandate may have resulted from the view that the office of advocate was *munus publicum*: he was sworn *de fidei administratione officii*, and by the trust and privilege of his gown he had a presumed mandate, as to all clients for whom he appeared within the kingdom, which superseded the necessity for producing a written mandate. The law of England seems to have adopted the rule of presumed mandate probably on the same

view of the office of counsel, and that it would be degrading to the dignity of the office to require a mandate. The perfect probity of counsel, and the conscientious discharge of the trust committed to them, do not, however, necessarily give any security that they really represent the party for whom they profess to act; and that for this reason, that counsel themselves may be misled or misinformed. According to the Roman law, the procurator for the defender might be required *in initio litis* either to produce his mandate or to find caution *judicatum solvi*; while the procurator for the pursuer was in most cases required absolutely to produce his mandate, and in every case to find caution that his actings would be ratified by the party.

Whether or no it might be advisable to adopt the Roman rule in its integrity, it is certainly desirable that our present practice in this matter, which is supported neither by reason nor by expediency, and which affords a cover for fraud, and exposes litigants to risk and uncertainty without any appreciable corresponding advantage, should be forthwith reformed, and a regular probative mandate required from the client as an initiatory step of process, both in the supreme and inferior courts. Although it seems at first sight a hardship that a party, who has never heard of an action in which his name has been improperly used, should be bound to implement a decree obtained therein, that appears to be a necessary result of the rule that the opposite party is not entitled to require production of a mandate. If the advocate's office presumes a mandate, equity demands that the opposite party, who is bound by that presumption, should be entitled to the benefit of it. To impose the burden of proving employment on him, as in a question with his opponent, would, in most cases, be to require an impossibility; for if fraud is intended, no trace of employment will of course be suffered to exist. (Per Lord Corehouse, in *Cowan v. Farnie*, 4 March 1836.)

The doctrine, that a disclaimer is no ground of suspension of a decree *in foro* in the Court of Session, had been previously decided with reference to a defender. The decision in *Young v. List* applies the same rule to the case of a pursuer. But the two cases are distinguishable in this respect, that the pursuer may have had no notice whatever of the proceedings, while the defender by his citation must have been made aware of the existence of the action. The Court, however, held that there was no distinction in principle between the two cases, because a defender, though cited, may have

good reasons for not appearing: he may, for instance, have intended that decree should go in absence, by which no expense is incurred, and against which he has the privilege of being reponed. This attempt to put the two cases on the same footing can hardly be accepted as satisfactory. It is clear that a defender who has had notice of the action is put upon his guard, and is to some extent bound to inquire as to its issue, or at all events has an opportunity of ascertaining what steps are being taken; while a pursuer has no possible means of ascertaining what is being done in his name, and stands in a totally different position.

In the early case of *Ballantine v. Edgar* (7 Dec. 1676, Dict. 348), even where the advocate offered to depone that he compeared for the defender without warrant, it was laid down that such appearance without warrant, though it might make the advocate liable for the party's damage, yet could not weaken the decret *in foro*. In a later case of *Wallace* (1 Shaw, p. 41, note), it was held by Lord Gillies, and acquiesced in, that an advocate, appearing *bona fide* for a party at the desire of a practising agent, is not responsible for the consequences of the agent's acting without authority. In *Hamilton v. Marshall*, 25 Nov. 1813 (F. C.), the question of the effect of a disclaimer in a suspension received the fullest consideration, and it was explicitly and authoritatively settled (at all events in the case of a defender), that it is not relevant to suspend a decree *in foro*, on an averment that appearance in the process in which that decree was pronounced had not been authorized by the suspender. It was there made a point in argument, that the suspender, being cited, had been made aware of the action; but the judges, in their opinions, state the principles of law broadly, without noticing the distinction between pursuer and defender. In the previous case of *Ballantine*, it seems to have been held that the averment of want of authority was not relevant even in a reduction; but in *Hamilton* the majority were of opinion, that such an allegation might be given effect to in a reduction, although not in a suspension of the decree. And again in *Cowan v. Farnie*, 4 March 1836, which was a decision in peculiar circumstances, and did not raise the question purely, the Lord Ordinary (Corehouse) observed, in his elaborate and valuable note, that the remedy of reduction is always competent, or even suspension, if there is reason to suspect collusion between the agent and the party against whom he ostensibly acts. Lord Mackenzie, in the same case, expressed an opinion, 'that where any

party, either with or without a reduction, certiorates the Court on reasonable evidence that he never gave a mandate, he is entitled to get free.' The Lord Justice-Clerk, in *Young's* case, said, that although he held suspension an incompetent remedy on the ground stated, he by no means would say that the suspender had no remedy; he might reduce the decree, and obtain repayment of his expenses, or any other appropriate remedy. While Lords Cowan and Benholme were understood to concur with his Lordship in holding the remedy of reduction to be competent, Lord Neaves expressly reserved his opinion on the point, and stated that he would express no opinion as to the competency of impugning the decree even in a reduction. In enumerating the authorities, it is right to notice the case of *Thomson v. Edinburgh Candlemakers*, 25 May 1855; in which, when a case came before the Court for approval of the pursuer's account of the expenses, one of the parties, called as a defender, stated that he had declined to give the use of his name to the action, and that he was not aware that it had been used till after final decree had found all the defenders liable in expenses; and therefore moved, that his name should be excepted in granting decree for the amount of the account. The Court, however, held that decree must, in the meantime, go out against him as against the other defenders,

DOMICILE THE TEST OF CONSISTORIAL JURISDICTION.

Judges' Opinions in causa JACK AND MANDATORY v. JACK,
7 February 1862.

THE question which has been decided in this case by the Second Division, in conformity with the opinion of the consulted judges, has attracted an unusual amount of interest in professional circles,—an interest which was not altogether attributable to the importance of the principle at stake, and which was certainly not enhanced by any considerations arising out of the facts or merits of the action. But the question concerned the jurisdiction of the Court of Session; and it happened, by a purely fortuitous coincidence of events, that just as the necessity had arisen in this suit for judicial inquiry into certain elementary principles of consistorial jurisdiction, and while the elements of such jurisdiction were actually under consideration by that institution to whose judgment

the solution of questions of pure legal principle ought always to be left, a fierce polemical discussion sprung up between the English and Scotch lawyers upon the subject. The late Lord Chancellor—very unadvisedly, as we think—took the initiative in the discussion, by attempting to smuggle into the Conjugal Rights Bill of 1860 a clause which would have had the effect of very materially abridging the jurisdiction of the Supreme Civil Court in Scotland, and of extending in a corresponding degree the powers of the new divorce tribunal at Westminster Hall. It is scarcely necessary to remind our readers of the nature of the proposed innovation. Its object was, while leaving the new-fledged Court of Divorce in undisturbed possession of jurisdiction over every subject of the Queen who had ever set foot on English soil, to deprive the Court of Session of that power, which the policy of our constitutional law has confided to every court of supreme authority, of determining, in accordance with the dictates of reason and of international policy, the limits of its own jurisdiction, and the circumstances in which it may be appropriately exercised.

We say nothing as to the soundness of the principle upon which the proposed statutory jurisdiction was intended to be based; but we have felt, and have more than once expressed what we believe to be the unanimous feeling of the profession in Scotland, that it was the interest of the public to leave questions of jurisdiction to the determination of judges learned in the law, and responsible for its administration. Such questions ought certainly to be removed as far as possible from the caprice and the prejudices of popular legislative assemblies; and nothing short of an actual collision of jurisdiction between courts owing allegiance to the same Sovereign, could in our opinion justify an encroachment upon the discretionary powers of the supreme judicature of either country, or excuse an interference which would be interpreted by the public as implying a want of confidence in the learning and discretion of those who are entrusted with the administration of the law.

A candid perusal of the judicial opinions which we have selected as the text for our comments, will, we are sure, in spite of national or controversial feeling, satisfy every impartial student of the law of jurisdiction as to the propriety of the course which was ultimately adopted by the Legislature, by which the Courts of England and Scotland were left at liberty to determine the grounds of their respective powers of jurisdiction, in accordance with the principles

of international law. We will add, that for just appreciation of legal principle, and an enlightened adaptation of the rules of jurisdiction to a class of actions in which that element is of the highest consequence to the parties and to the interests of society, these opinions will bear comparison with those luminous judgments of former times which have gained for the decisions of the Court of Session an honourable position in the estimation of foreign jurists. Without detracting from the importance of the doctrines laid down in the earlier class of decisions, among which *Warrender v. Warrender* is conspicuous, we believe that the clear and unequivocal assertion, in the present case, of the *forum domicilii* as the *only real basis* of consistorial jurisdiction, involving as it does the recognition of the principle, that status can only be affected by a court to whose jurisdiction *both parties* are in some degree amenable, has placed the law of consistorial jurisdiction on a more solid and satisfactory footing than it has hitherto occupied.

The circumstances of the case were calculated to raise the issue of jurisdiction *ratione domicilii* more purely than in any other case of recent date. It is unnecessary to enter into all the details of these circumstances, which were raised upon the record, no issue of fact having been raised between the parties. The action was brought by a husband against his wife, for dissolution of the marriage on the ground of adultery, alleged to have been committed by her. The marriage took place in June 1853, when both parties were domiciled in Scotland. From that date they continued to reside in Scotland, cohabiting as married persons, till June 1855, when the pursuer, who was a native of Scotland, withdrew from the society of the defender, and took up his residence in the United States, where he acquired the status of a clergyman, and was at the time of raising the action (January 1860) minister of a congregation in the State of New York. It was alleged by the defender, and admitted by the pursuer, that his object in going to America was to avoid the society of his wife. It came, therefore, to be rather a matter of opinion or inference than of fact, whether he intended, in taking that step, to sever his connection with the mother-country, and acquire a new domicile in America. The case did not admit of any evidence on the subject, other than that of probable intention, to be deduced by the Court upon a consideration of the circumstances and causes of the separation. The defender continued to reside in Scotland until the action was raised; and the main argument for the

pursuer in support of the jurisdiction of the Court, was based upon the fact of the defender's residence within the territory of the Court of Session, which, coupled with the alleged commission of adultery in Scotland, was held to give the Court jurisdiction *ratione delicti*.

A separate point was maintained, to the effect, that the defender's residence, taken in conjunction with the element of a Scotch marriage, gave the Court jurisdiction *ratione contractus*; the ground of action—i.e., the alleged adultery—being, it was said, a breach of the contract of marriage, for which the other contracting party was entitled to demand a remedy in the *locus* of the contract. The opinions of the judges lend no sort of countenance to this attempted extension of the *ratio contractus* to actions of divorce. Indeed, the argument is only referred to in the opinions for the purpose of disclaiming any intention of proceeding upon such a basis of jurisdiction. The principle is thus laid down in the opinion of Lords Neaves and Mackenzie:—‘The place of the celebration of the marriage cannot contribute substantively to found a jurisdiction. Marriage is brought about by contract; but, except as to certain matrimonial claims, the rights and results of marriage do not flow from the local contract by which it is formed, but arise from the social relation thereby constituted, and which is a personal relation *juris gentium*. Parties who have contracted marriage become married persons all over the world; and in every country, or at least every Christian country, in which they may live, their relative position will depend for the time upon the municipal law of that country, and will not be affected by the law of the place where the marriage was celebrated, any more than it would be affected by any special stipulations as to essential conjugal rights which the parties themselves might choose to superadd to the legal contract.’

This statement of the law of Scotland, acquiesced in by all the judges, and confirmed as it is by the opinion of Savigny, who says expressly (Sav. System des Romischen Rechts, vol. 8, p. 241), that the *forum contractus* serves only for those actions directed towards the fulfilment of the obligation, and not for those which aim at its dissolution,—may be considered to have given the death-blow to the *forum contractus* as a basis of jurisdiction upon actions for the dissolution of marriage.

The judges were not unanimous as to the inadmissibility of the *forum delicti* as a basis of jurisdiction. The question was avoided in the joint opinion of the Lord President, Lord Ivory, and Lord

Curriehill, who rest their judgment upon domicile alone, and say nothing as to the other grounds. Lord Deas would not say that in such a question the *locus originis*, the *locus contractus*, and the *locus delicti* might not be elements of less or more importance; but he added, 'The essential thing which I desiderate is, that both parties should have a domicile subjecting them to the jurisdiction of the Court which is asked to change the status of both of them.' Lords Neaves and Mackenzie (with whom Lord Ardmillan concurred on this point) said, 'It is plain that the *locus delicti* has nothing to do with the jurisdiction in such a case. A Scotch court is entitled to grant a divorce for adultery, wherever the adultery may have been committed; and the mere fact that adultery has been committed within its territory, cannot entitle it to deal with the status of parties not otherwise subject to its laws.' The fallacy of the argument in support of the *forum delicti* is exhibited in a single sentence of the opinion of Lord Kinloch:—'The question,' he says, 'is not one of crime and penalty, but of status and its regulation; and with this the mere locality of the adultery has nothing whatever to do.' 'If,' he continues, 'the home of the married pair is in a foreign country, the mere fact of one of them, husband or wife, coming into Scotland and committing adultery, clearly will not give competency to the Scottish courts to pronounce in a divorce.' With the opinion of Lord Jerviswoode, who thought the *forum delicti* entitled to even less consideration than the forum of the contract, we conclude our abstract of the views of the consulted judges on this important question. On the other hand, we infer that the Second Division, before whom the cause came for advising, were not indisposed to leave the competency of the *forum delicti* an open question. The Lord Justice-Clerk indicated rather than expressed an opinion, that it might be important where the more positive elements of jurisdiction, such as domicile, were wanting. And Lord Cowan, in adverting to the opinion of the first Lord Meadowbank (whose position is deservedly high among the authorities on consistorial law), observed, that he was not prepared to abandon a ground of jurisdiction supported by so eminent an authority, and which in the recent case of *Shields v. Shields* had received the express sanction of that division of the Court.

Substantially, however, the judgment of the Court must be viewed as a negation of the *forum delicti* for actions of divorce. The competency of this ground of jurisdiction was the question raised in the

arguments of the parties ; and the remit to the consulted judges was made in respect of the importance of the principle involved in that question. The opinions which we have quoted lead irresistibly to the conclusion, that if the element of the *forum domicilii* had not lain within the facts of the case, the pleas against the jurisdiction would have been sustained. This will be more apparent on looking at the grounds of the reasons advanced by their Lordships for sustaining the jurisdiction, and which all tend to support the proposition, that the status of husband and wife cannot be changed except by the court of the country in which they have a domicile.

Nothing, however, can be clearer on the face of the opinions, than that the Court of Session refuse to recognise the doctrine of *exclusive jurisdiction* in matrimonial actions. We use the term, *exclusive jurisdiction*, in the sense in which it has been applied to the determination of the rights of succession and the meaning of settlements. In that class of cases there can be no conflict, since by a rule of administration, common to all systems of jurisprudence, the law of the *principle domicile* is recognised as having exclusive authority to regulate both the interpretation of the will, expressed or presumed, and the administration of the personal estate. So also the jurisdiction of the *forum loci rei sitæ* is exclusive of all others in questions relating to real property. The machinery of a foreign system of jurisprudence may be called into action to enforce implement in the country of the defender's residence ; but in the exercise of this ministerial power there can be no collision of judicial opinion with reference to the rights of the parties, because the court of the defender's residence accepts implicitly the adjudication of the *lex domicilii* upon the rights of the claimants, and merely lends the aid of its process to give efficacy to the determination of the regulating law. Concerning matrimonial status, however, in so far as that is liable to be affected by decrees dissolving a marriage, there is, unfortunately, still some room for possible conflict. Nor can it well be otherwise, so long as the law of divorce is different in different countries ; for, divorce being a remedial process, it is both natural and reasonable that the tribunals of any country in which the remedy is permitted should administer their own law to all persons, without distinction, who are subject to their jurisdiction by virtue of domiciliary residence. *What constitutes a domiciliary residence in any given country, is a matter of municipal regulation.*

The period of forty days' residence is sufficient to subject the defender to the jurisdiction of the courts of Scotland; and it is quite obvious that the acquisition of such a residence may not be inconsistent with the retention of a domicile for the purposes of jurisdiction in the territory of another state. Conversely, it is by no means to be supposed that the mere absence of a litigant from the territory of the Scotch courts for forty days, or even for a much longer period, is to dissolve the allegiance (if we may use the term) which the party owes to the courts of his country. Accordingly, in the case under consideration, it was laid down that the husband, by the act of leaving Scotland for the purpose of avoiding the society of his wife, had not escaped from the obligation which he had undertaken to submit to the authority of the Court of Session, and to answer to that court for the fulfilment of his matrimonial obligations. He was still liable to be sued in Scotland for adherence; and if so, he must be equally entitled to insist as pursuer in any competent action for the enforcement of *his* matrimonial rights, or for the redress of injuries affecting his matrimonial status.

Such is the principle which we deduce from the expositions of the learned judges upon whose opinions the case of *Jack v. Jack* was decided; and it is satisfactory to find that they are in entire accordance with the views upon which Sir C. Cresswell has maintained the jurisdiction of the English Court of Divorce, in several cases in which decree of dissolution was pronounced, notwithstanding the absence of one of the parties from the parent country. Whether they are or are not in precise accordance with the *dicta* of the civilians of the Roman-Dutch school, is a matter of secondary importance. The authority of those writers is, no doubt, entitled to much weight in questions of this nature, on account of the careful and systematic manner in which they applied themselves to the elucidation of the principles of international jurisprudence. But it does not appear, so far as we have been able to discover, and speaking from a general acquaintance with that branch of literature, that the Dutch civilians, in treating of jurisdiction, have been very successful in their attempts to apply their principles to the solution of questions involving the element of status. The *forum speciale* is, as every lawyer is aware, brought forward very prominently in the works of Huber, John Voet, Vinnius, Burlamaqui, and others of that school. They discuss the effect to be given to residence in conjunction with the *ratio contractus*, the *ratio originis*, the *ratio*

delicti, and the *ratio rei sitæ*, with clear discrimination, and just appreciation of the rights of rival judicatories. But, in the discussions to which we refer, the authors do not appear to have contemplated the application of their principles to questions of status, but rather to have had in view the interpretation of contracts and the determination of rights of property. On the other hand, they are unanimous in according to the court of the domicile the widest sphere of jurisdiction in matters personal,—a jurisdiction of unlimited scope and unquestioned sufficiency as regards the persons on whom it was to be binding, and yielding only to the *forum rei sitæ* in the single case of decrees affecting real property, which, from the impossibility of enforcing them *extra territorium* of the judge, are held to pertain exclusively to the jurisdiction of the territorial court. It may safely be asserted, that there was nothing in the dogmas of those international jurists whose authority stands highest in general estimation, which could have made the court hesitate as to the propriety of considering the question of the sources of matrimonial jurisdiction upon its merits; and there can be as little doubt that, in discarding special grounds of jurisdiction, and adhering to the principle of *forum domicilii*, the judges have rested the authority of the court in this class of actions upon the only rational and unassailable basis.

NOTES ON THE LAW OF CHARITABLE ENDOWMENTS.

THE rules affecting the construction and administration of charitable endowments are almost entirely dependent on the common law, the Legislature having abstained from that interference with Scottish Charities which is so marked in connection with those of England. Indeed, it would appear that, with the two exceptions, if such they be, to be immediately mentioned, the only statute dealing with them at all is the Act 1663, c. 6, 'against the inverting of pious donationes,' which, on the narrative of the frequent inversion or misappropriation of grants to colleges, schools, hospitals, and other pious uses, provides that those entrusted with such grants shall be accountable to the beneficiaries, and that actions shall be competent at the instance of the beneficiaries, or the bishops and ordinaries within whose diocese the mortifications¹ lie, to compel them to administer the trusts ac-

¹ *Mortification* was of old the kind of tenure by which lands were held when they were granted to religious houses or for other pious uses. These grants were made *ad manum mortuam*—i. e., as Professor Menzies explains, 'to a hand

according to the terms of the grants, and, over and above, to account for the ordinary profits of every year's intromission, 'at the rate allowed by the laws of the realm.' Again, in a recent case (*Pet., Tweedie*, 22 Jan. 1858, 20 D. 438) it was made matter of question whether, under the 19 and 20 Vict., c. 79, secs. 164–166, private trusts could be brought under the superintendence of the Accountant in Bankruptcy, so as to obtain, at the public expense, a periodical audit of the trust accounts and exoneration of the trustees. The Court did not decide the point; but the opinions expressed were adverse to the competency of such a procedure. It is an important and still unsettled question, whether the Act of last session (24 and 25 Vict., c. 84), 'to amend the law in Scotland relative to the resignation, powers, and liabilities of gratuitous trustees,' is applicable to the trustees of charitable institutions. The Act provides, that 'all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum; and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions.' Section *second* provides, that nothing contained in the Act 'shall affect any liability incurred by any gratuitous trustee prior to the date of any resignation or assumption under the provisions of this Act, nor any action at law commenced before the passing of this Act.' Section *third* declares that 'a gratuitous trustee shall, for the purposes of this Act, be held to be any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is *under no obligation, without special acceptance of such office, to discharge the duties of trustee*; provided always, that nothing in this Act shall extend to any trustee appointed under the contract of any trading company.'

It is a question of considerable difficulty whether this statute can

that could neither fight for the superior nor transfer the grant.' At the Reformation the tenure was abolished; and all lands mortified for superstitious purposes were annexed to the Crown. Those granted for charitable and other benevolent purposes, however, were not annexed, and lands may still be mortified for any lawful purpose, to be holden feu or blench.

be held to affect *ex officio* trustees ; for with some show of reason it may be maintained, that no special acceptance of the trusteeship is ever necessary in their case. But, on the other hand, as it would seem that individual members of a corporation, for example, may decline the trusteeship, their not declining, much more their not acting in that character, might possibly be held to constitute a special acceptance, and so bring them within the scope of the Act. There can be no doubt that the statute will apply to all charitable trustees who are not so *ex officiis* merely.

I. *Interest of the Beneficiaries under Charitable Endowments.*

The law of Scotland imposes few restrictions on the creation of perpetual trusts. The Mortmain Act (9 Geo. IV., cap. 36) does not extend to Scotland at all—even where the money settled is invested in the British Funds (*Macara v. College of Aberdeen*, 1 Feb. 1786, M. 15946, Hailes 975), and the Thellusson Act (39 and 40 Geo. III., cap. 98) expressly excepts from its operation, ‘dispositions respecting heritable property’ within Scotland. The latter statute, however, prevents accumulations of personal property beyond twenty-one years after the testator’s death. It has been held that a direction to trustees to accumulate personal property in Scotland will not defeat the trust altogether; but the accumulation will be limited to a period of twenty-one years after the truster’s death (*Ogilvie’s Trustees v. Kirk-session of Dundee*, 18 July 1846, 8 D. 1229).

In moving the affirmance of the judgment of the Court of Session, in the case of *Hill v. Burns* (14 Dec. 1824, 3 S. 389; affirmed 14 April 1826, 2 W. and S. 80), Lord Gifford observed: ‘It appears to me that the law of Scotland is more liberal in the interpretation of bequests for charitable purposes than other bequests.’ The remark was well founded, as almost all the cases show. If they can possibly avoid it, the Court will not hold a charitable bequest void for uncertainty. In the case already mentioned (*Hill v. Burns, ut supra*), a bequest to trustees, in the widest terms, giving them the largest discretion in distributing certain funds among the charitable and benevolent institutions in the city of Glasgow, was sustained both by the Court of Session and the House of Lords. Lord Balgray said, ‘The whole case depended on the point,—whether it was lawful for a testator to put the disposal of his property at the will and discretion of another? He thought it was.’ Again, a bequest in the following terms:—‘It is my wish that such remaining means and estate

shall be applied to such charitable purposes, and in bequests to such of my friends and relations, as may be pointed out by my said dearly beloved wife, with the approbation of the majority of my said trustees' (*Crichton v. Grierson*, 12 May 1826, 4 S. 553; affirmed 25 July 1828, 3 W. and S. 329), was held not to be void for uncertainty. In another case (*Murdoch v. The Magistrates and Ministers of Glasgow*, 30 Nov. 1827, 6 S. 186), a testator, by a codicil to his trust-deed, left L.5000 for the maintenance of a school, in which boys were to be taught reading, writing and arithmetic, 'to be under the management of the magistrates and ministers of the Established Church.' No place was specified, but in respect that the truster was born, resided, and died in Glasgow, that his trust-deed and codicil were dated, and his trustees were resident there, it was held that the bequest was not void for uncertainty, and that the 'magistrates and ministers' referred to were those of Glasgow. The House of Lords, on the advice of Lord Wynford, adopted a different course in the case of *Ewen v. The Magistrates of Montrose* (5 Feb. 1828, 6 S. 479; reversed 17 Nov. 1830, 4 Wilson and Shaw, 346). There a testator having in 1821 left L.6000 to found an hospital, and provided that that sum and the interest on it should be accumulated till it amounted to L. , and that the number of boys in it should be ; the Court of Session sustained the bequest, subject to the operation of the Thellusson Act preventing accumulations after twenty-one years. The House of Lords, however, reversed the judgment, and set the bequest aside, on the ground of uncertainty. The authority of the case has been frequently doubted; as by Mr Boyle in his work on the 'Law of Charities' (pp. 302–6), and by the House of Lords itself in the Morgan case (*Magistrates of Dundee v. Morris and Others*, 26 June 1857, 19 D. 917; reversed 11 May 1858, 3 Macq. 134).

A bequest for 'charitable and benevolent purposes' is not void for uncertainty (*Black's Trustees v. Miller*, 23 Feb. 1836, 14 S. 555; affirmed 14 July 1837, 2 S. & M'L. 866). Much to the same effect was held in a subsequent case (*Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427). The well-known Morgan case is, however, probably the most remarkable instance of the favour which the law shows to charitable bequests. The case was of this nature: the Magistrates of Dundee claimed the establishment of an hospital in that town, under the following testamentary writings of the deceased John Morgan of Edinburgh:—

‘Edinburgh, 10 October 1842.—I hereby annul all hitherto written on the first, second, and third pages of this, and wish to establish in the town of Dundee, in the shire of Forfar, an [*an hospital strictly in size, the management of the interior of said hospital, in every way as Heriot’s Hospital in Edinburgh is conducted*].¹ The inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose; but inhabitants of any other county or town are excluded. JN^o. MORGAN.’

‘I hereby wish only one hundred boys to be admitted in the hospital at Dundee [*and the structure of the house to be less than that of Heriot’s Hospital*],¹ and to contain one hundred boys in place of one hundred and eighty boys. JN^o. MORGAN.’

‘Edinburgh, 20 October 1842.’

The words deleted were still legible. The Court of Session refused to spell a will out of these writings; the words of which, Lord Murray said, were mere scratches, *rari nantes in gurgite vasto*. But the House of Lords adopted a different view; and taking as their guide ‘the principle of a benignant construction of charitable bequests,’ their Lordships first sustained the writings above quoted as constituting a will, and then held that the will was not void for uncertainty. The mixed process of reasoning and conjecture by which this result was arrived at, is both curious and instructive. Thus, the Lord Chancellor Chelmsford remarked (3 Macq. 155):—‘But then it is said that there is nothing to indicate the class of boys for which the hospital was to be provided, nor anything to lead to any conclusion as to whether they were to be merely educated, or to be also boarded and lodged. Now, as to the class of boys, they were described with sufficient precision by reference to the inhabitants born and educated in Dundee and the other three towns, by which, I understand, not the persons themselves who were residents and who had been born and educated there, but the sons of such persons,—a qualification which, though it might embrace inhabitants of different stations and degrees in society, is yet sufficiently definite to admit of a clear and certain application. Nor can I entertain any doubt of the intention of the testator, that the children should be maintained as well as educated; because, they were not to be confined to the town of Dundee, but were expected by him to come from other and distant towns, and would require, therefore, to be lodged and fed in the intended hospital. There may be some

¹ The words printed in italics were deleted in the original.

doubt whether they were also meant to be clothed. But any uncertainty as to these minor details would not have the effect of defeating his main purpose, any more than his silence as to the description and character of the education which was to be provided for them. But it was strongly urged upon your Lordships in the course of the argument, that the testator had not specified any certain sum, nor furnished any means for rendering certain how much was to be applied to the establishment of the hospital.' 'Here,' his Lordship continued (3 Macq. 159), 'the place of the hospital is defined—the town of Dundee. The size also of the hospital can be easily ascertained, as it is to be for 100 boys. And there would be no difficulty, therefore, in applying the testator's property, not to a mere vague and indefinite object, but to one expressed with sufficient certainty to be capable of being carried out. To this object, it appears to me, that it was the intention of the testator to devote the whole of his property, or such a competent part of it as might be sufficient for the purpose.' Lord Cranworth carries on the process, and fixes the class of boys thus :—'Then the class of persons. That is to a certain extent no doubt vague, but it must be a class from those three or four provincial towns who would be reasonably supposed to seek the benefits of a gratuitous education. I think that is sufficiently certain.' Lastly, Lord Wensleydale clothes and houses the recipients of the charity, while he provides an endowment for the hospital. 'From the use of the word "hospital," which is certainly connected with the relief, in some way, of the poor, it may be collected that they were to be supplied with necessaries, clothing included; and finally, as this bequest was for the establishment of the hospital, there must not only be buildings, but an endowment.'

It may be presumptuous to suggest that much of this is very fanciful, and that the principles on which such a mode of construction rests are somewhat dangerous. Be that as it may, there can be no doubt that the Morgan case will be followed as a precedent. Its influence was observable in a recent decision of the First Division (*Royal Infirmary of Edinburgh v. Lord Advocate*, 20 June 1861, 23 D. 1213). A testator, who had executed a tested deed in favour of certain trustees, giving funds to various charities, afterwards deleted the provisions to certain of the charities, marking them *cancelled*, and signing the cancellation. He also deleted the names of his trustees, writing on the margin opposite the deletion, 'Managers of the Edinburgh Royal Infirmary for the time being,' and signing

the marginal addition. In a holograph codicil he said, 'I hereby appoint the Managers of the Edinburgh Royal Infirmary for the time being my sole executors and trustees.' The Court held that the managers were properly substituted as trustees, and that the conveyance to the Infirmary was good. No opinion was given as to how it would have been if no new trustees had been named, or whether, if the names of the trust disponees had been rendered a total blank, the trust could have been sustained, the Court naming trustees or a factor.

It has been decided that bequests to official persons are good, though they are not a corporation, and that their successors in office succeed them as trustees (*Macara v. College of Aberdeen*, 1 Feb. 1786, M. 15946, Hailes 975).

Where an evident clerical error has been made in the nomination of the trustees, or where circumstances have altered since the date of the trust-deed, the Court will interpose and take care that, as far as possible, the intentions of the truster shall have effect. Thus, where in a trust-deed, one of the *ex officio* trustees was styled the 'Moderator of the City of Aberdeen,' while it was obvious that the 'Moderator of the Synod of Aberdeen' was meant, the Court, in an action of declarator, rectified the mistake, declaring, however, that they did not do so in the exercise of any prætorian power (*Synod of Aberdeen v. Milne's Trustees*, 25 Feb. 1847, 9 D. 745). The recent case of *Duff's Trustees v. The Lord Mayor of London* (18 Mar. 1862, not yet reported), decided in the Outer House, came very near to, if it did not go the whole length of, recognising the equitable doctrine of *cy-près*. (See the English doctrine explained, *infra*, p. 195). The testator bequeathed a fund to be divided in equal proportions between the 'Societies of Scripture Readers' in certain towns, and *inter alia*, in Dundee and Inverness; and the Lord Jerviswoode sustained the claims of the societies called the 'Inverness Scripture Reading and Tract Distributing Society,' and the 'Dundee City Mission Association;' for, said his Lordship, 'seeing that there are no competing claims from these towns, and having reference to the *character of the bequest*, he is of opinion that he is acting within the true intention of the testator in sustaining the claims to the extent specified in the interlocutor.' We see no reason to doubt that the Court of Session, as a court of equity, has power to carry into effect a testator's intention, although it should be necessary, in doing

so, to entrust the administration of his bequest to a society which may not exactly answer the true description, but whose constitution enables it to carry his benevolent wishes into execution.

The founder of an hospital in Aberdeen named as patrons the Magistrates, Town Council, and 'four ministers commonly called the Town's four ministers of the Old and New Churches and their successors in their respective offices,'—there being only two collegiate churches and four ministers at the time. The burgh being afterwards divided into six parishes, having each a single clergyman, the Court held that only four ministers could be patrons, two of them always being the ministers of the churches referred to in the deed of mortification, and the others being chosen according to the seniority of their appointment as town's ministers; or if they were coeval in that respect, then by their seniority as licensed clergymen (*Governors of Gordon's Hospital v. Ministers of Aberdeen*, 8 July 1831, 9 S. 909). Again, by George Heriot's will, the governors of his hospital were the Provost, Magistrates, and ordinary Council of Edinburgh, and the ministers thereof for the time being. At the date of the foundation, certain representatives of the Incorporated Trades were constituent members of the Council, but they lost their rights as such by the Burgh Reform Act. The Court held, that in ceasing to be members of the Council, they had also lost their right as to the governorship of the hospital (*Incorporated Trades of Edinburgh v. Governors of Heriot's Hospital*, 3d June 1836, 14 S. 873). In delivering his opinion, the Lord President Hope alluded to the circumstance, that since the foundation of the hospital the ministers of Edinburgh had become Presbyterians from being Episcopalians, and had increased in numbers from eight to eighteen, and yet all of them were entitled to act as governors.

A bequest made, prior to the Poor-Law Amendment Act (8 & 9 Vict., c. 83), 'to the Minister and Kirk-session of the Parish of Bathgate for the time being, for the benefit and behoof of the poor in the said parish,' includes both able-bodied and legal poor, and does not fall under the 52d section of the statute (*Liddle v. Kirk-session of Bathgate*, 14 July 1854, 16 D. 1075).

A testator domiciled in Jamaica named as his trustees, to administer a charity in Scotland, five heritors of the parish which was to benefit by the bequest, 'their heirs and assignees,'—the Court held that the trusteeship was hereditary in the family of each heritor, and was not to be restricted to the heir of the last survivor of the

original trustees (*Ferguson v. Marjoribank*, 1 April 1853, 15 D. 637).

In England, charities are not less favoured objects in the eye of the law than they are with us. Of this no better proof could be adduced than the existence of the well-known doctrine of *cy-près* (or approximation). In treating of this doctrine, Mr Boyle says (*Boyle on Charities*, 147, *et seq.*), 'If charity be the general, substantial intention, though the mode by which it is to be executed fails through accident or other circumstances, the Court will find some means of effectuating that general intention (*Attorney-General v. Earl of Winchelsea*, 3 B. C. C. 379; *Attorney-General v. Minshull*, 4 Ves. 14; *Moggridge v. Thackwell*, 7 Ves. 69–82). In resorting, therefore, to the principle of *cy-près*, the Courts have been guided by a supposed discovery of intention, on the part of the donor, to devote the subject of his gift, at all events, to charity, and to deprive his representatives of every claim to the property. Upon this supposed indication of the donor's will, such obstructions as may occur in the course which he has himself pointed out, are not allowed to arrest, but merely to turn aside the flow of his bounty; whilst, if no course has been perceptively directed by him, a channel, by which his charity may be rendered both beneficial and useful, will be marked out by the Court. Thus it is well established, that where the donor has left the selection of objects, as in some cases; of the mode, as in others; and of the charities themselves, as in a third class of cases, to individuals who afterwards become incapable of executing the office confided to them, the Court will take upon itself to act in their stead (see 7 Ves. 78). It would indeed be difficult to advance any proposition which is more firmly established in courts of equity, than that a trust shall not be allowed to fail for want of a trustee. And although, in several instances, where a charitable gift has had to be executed *cy-près*, it has been sought to have limits assigned to that proposition, yet the rule has been invariably acted upon.' It would be in vain to examine, in detail, the various modifications of this doctrine, and the manner in which it has been applied by the English courts. A very large portion of Mr Boyle's '*Treatise on Charities*' is devoted to an examination of these, and to it therefore we must refer (*Boyle*, 147–280).

[In another article we shall complete the subject by a review of the decisions relating to resulting interests under charitable trusts.]

New Books.

A Compendium of the Law of Insurance, comprising Marine, Fire, and Life Insurance. By THOMAS S. PATON, Esq., Advocate. Edinburgh : T. and T. Clark.

MR PATON is well known to the profession as the editor of a series of reports of appeal cases for the period previous to the issue of Shaw's Reports in 1821 ; when, for the first time, regular reports of the current decisions were issued, under the authority of the House of Lords. In collecting, arranging, and abridging the unpublished decisions of a century of litigation, Mr Paton rendered an important service to the legal profession,—a service which could only have been efficiently rendered by one possessed of some of the most valuable qualifications of a legal adviser—namely, untiring industry, conscientious devotion to the business in hand, and a competent knowledge of the law which he had undertaken to illustrate. We believe that those who most frequently have occasion to consult the reported decisions will be found most willing to acknowledge the utility of Mr Paton's labours in this useful, though comparatively uninviting field of literature.

Mr Paton's subsequent literary efforts have been of a more fragmentary character. Instead of attempting to identify his name with some one subject sufficiently extensive to afford scope for the display of learning and research, he seems to be satisfied with illustrating special subjects that have not been treated with much fullness by the institutional writers, but which, on the other hand, have scarcely attained such an importance in the law of Scotland as to require that careful and elaborate treatment which can only be given in a special treatise. For example, his *Commentary on the Law of Stoppage in Transitu*, although useful and accurate enough so far as it went, could only be regarded as a chapter in what is very much wanted at present,—a modern treatise on the Law of Sale, as administered in Scotland. The Law of Insurance, which is the subject of Mr Paton's latest publication—although in itself it perhaps affords a sufficient foundation for a good special treatise—has been treated in the same desultory way. Although it has the merit which the author claims for it, of possessing the requisite degree of condensation which, in combination with care and accuracy, render a legal

work useful for purposes of immediate reference, Mr Paton's work has but slender pretensions to rank as a systematic treatise.

The author is evidently well acquainted with the principles of the Law of Insurance, and has marked out the limits of his subject intelligently and with precision. But, unfortunately, the method of arrangement which he has adopted is not calculated to produce a corresponding clearness of perception in the mind of the reader. Every person acquainted with mercantile transactions is aware that the kind of questions that arise under the different categories of fire, life, and marine insurance, are as different from each other as the risks, the subject of insurance, and the conditions as to validity, are different. It was therefore most desirable, if not absolutely essential, that the arrangement of the subject should have been based upon the natural and obvious principle of a threefold division, treating of these contracts separately in different parts of the work. Mr Paton, however, has adopted a more artificial system of classification; by which he divides the whole subject into seventeen chapters, in the various parts of which he discusses certain relations of the contract, and illustrates them by examples drawn from the three classes of risks in succession, or from such as are applicable. The consequence of this arrangement is, that the reader, desirous, it may be, of ascertaining the construction of a certain condition—in a policy of life assurance, for example—is obliged to pass through a fiery and aqueous ordeal—to investigate the action of the igneous forces, and to brave the perils of the sea—before he comes to the topic of which he is actually in search.

We do not overlook the consideration, that a principle may be best illustrated by bringing into one view the different species of contracts to which it has relation. But this advantage is overbalanced by the inconvenience experienced in consulting a work the arrangement of which is rather conventional than practical.

It was of course inevitable that, in the investigation of a branch of purely commercial law such as insurance, great reliance should be placed upon English decisions. Until our law has been assimilated to that of England to a greater degree than, for the sake of the science, we hope it will be in our time, it is not to be expected that any large proportion of the members of the legal profession in Scotland will possess themselves of the English law reports. It is therefore most desirable, when English decisions are referred to, that the facts of the case should be stated briefly, yet with such distinct-

ness as to exhibit the manner in which the question of law was presented for the determination of the court. The notes to the quarto edition of Bell's Commentaries furnish an admirable example of the proper mode of exhibiting the authorities, in the treatment of questions of mixed English and Scotch law. We presume the brevity of the plan of Mr Paton's work was the reason for omitting to state the import of the English cases which he cites very copiously in support of his propositions. The absence of that feature, which gave such a peculiar value to the works of the late Professor Bell, must be regarded as a blemish in any Scotch treatise bearing upon mercantile law.

In other respects, the execution of Mr Paton's volume is pretty satisfactory. Here and there we notice a deficiency of practical information in matters relating to mercantile usage, such as the forms of policies and the mode of carrying through insurance transactions by the intervention of brokers, etc. But the law of insurance, in so far as it is matter of decision, appears to be carefully studied and succinctly stated.

Before concluding, we hope Mr Paton will pardon us for entering an energetic protest against his very disrespectful treatment of Messrs Shaw and Dunlop's Reports. It is scarcely civil to omit the reference to the number of the volume, which Mr Paton has constantly done;¹ but to go the length of actually *misnaming* the series, is very inconsiderate towards the reporters, besides injuring the utility of his book as a work of reference. Mr Paton may have a reason for using the formula 'S. and D.' to denote indiscriminately both the first and second series of the Court of Session Reports; but the recurrence of this formula, divorced from its natural conjunction with the number of the volume or series of volumes to which it relates, however much it may be supposed to embellish the pages of Mr Paton's treatise, is more likely to mystify than to aid the practitioner in his researches. Mr Paton of course may plead the example of the Institutionalists, who, after quoting from the text of the civil law, never by any chance condescended upon a numerical reference to the texts which they so glibly cited. If they had done so, the reader might have discovered that the text, in nine cases out of ten, did not bear out the doctrine! We hope Mr Paton has a better reason for withholding the needed references; and that when his

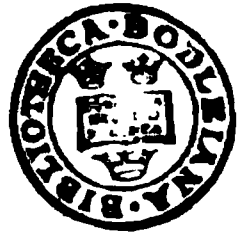
¹ For instances of this, see the following pages, selected at random from the first four sheets, viz., pp. 3, 4, 8, 11, 12, 13, 32, 34, 36, 41, 46.

second edition appears, which we shall be glad to see, he will not assume that every lawyer who may have occasion to consult his useful treatise has attained such proficiency in the science of mnemonics as to be able to solve at sight a question somewhat akin to the famous nautical problem: 'Given, the latitude and longitude of a ship at sea to find the name of the captain!'

THE MONTH.

The Education Bill.—Among the measures of the present session relating to Scotland, there are few which are specially interesting to members of the legal profession. Indeed, the only strictly legal measure of which intimation has been given, is the Lord Advocate's Bill for the simplification of conveyances of moveable property. There are other measures, however, which, although belonging to the class of social rather than of legal reforms, deserve the attention of the lawyers, from the manner in which they propose to deal with valuable public and private interests.

The Education Bill is, unquestionably, the most important Scotch measure of the session. It must be gratifying to the friends of education in Scotland, to find that the leaders of the opposing political parties have agreed to sink their political differences, and to co-operate for the attainment of an object which has always commanded a widespread interest in our country. Without entering upon such debateable questions as the expediency of Privy Council Grants, and the advantages supposed to have been secured by the operation of religious tests, we may assume as a fact, that no system of education combining those elements was likely to have been acceptable to the bulk of the community; and we think there can be but one opinion as to the prudence and propriety of the resolution which has been taken by the leaders of the Scotch Conservative party, to acquiesce in the principle of the measure that has been introduced. Strict justice, perhaps, would have required that a measure of education professing to be truly national and unsectarian, should have dealt with the element of religion in such a manner as to include within its scope all sects of professing Christians. The Irish National School system affords an example of the practical working of a secular system of education, in combination with such an amount of moral and religious training as may be conveniently imparted at



school, excluding doctrinal and controversial topics. In the public schools of our large towns, the same system is pursued with entire success; and we believe it would be found on inquiry, that even the most zealous supporters of what is called a religious, as distinguished from a secular system of education, might be ranked among the practical adherents of the opposite system, in so far that they have no scruple in sending their own children to public schools, where the youth of all sects and opinions receive a secular and moral education without distinction of creed or party. We cannot help thinking, that if the nation could have afforded to wait until the sectarian dissensions and asperities for which our countrymen are at present somewhat unhappily distinguished, were allayed, public opinion would ultimately have pronounced in favour of such a comprehensive scheme as we have indicated. But it was necessary, in the meantime, that provision should be made for the educational requirements of the existing community. The plan which is proposed, and which is intended, we presume, to embrace at any rate the whole of the Presbyterian population of Scotland, although it may not be theoretically perfect, has at least the merit of being on a level with the opinions of the time.

. At the time we write, the Lord Advocate's Bill has not yet appeared in print; but its leading provisions were fully and clearly explained by its author, in moving the first reading in the House of Commons; and the expressions of approval which that speech elicited from Mr Mure and Mr Murray Dunlop,—who may be regarded as fairly representing the opinions of the Conservative and more advanced Liberal sections of the community,—and to whom, we presume, the details of the measure had been communicated, are a sufficient guarantee, if such were wanting, that the Bill has been framed in the interest of the general community, and not with the object of promoting the ends or consulting the conveniences of a sect. The withdrawal of all religious tests in connection with the new schools, is a concession to the opinions of the time which could not have been refused upon any decent pretext; and the emancipation of those schools from the control of the Church, was probably felt also to be inevitable; for it is quite certain that no new grant of money would now be obtained from the House of Commons, the application of which was to be at the disposal, or subject to the control of any ecclesiastical body. If it is considered necessary to vest a superintending power in some official body, a commission com-

posed of members of the University Courts constitutes perhaps as fair a tribunal as could have been selected. The only doubt is, whether there be any necessity for official supervision. We incline to think that the question of the necessity for new schools, as well as the power of appointment, control, and dismissal of the teachers, might have been very safely left in the hands of the heritors and ratepayers of the respective parishes and districts. The power which the Government would in that case have reserved to itself, of withholding pecuniary aid from schools which did not come up to the standard of efficiency, would, we think, have afforded a sufficient check upon maladministration or neglect.

We are somewhat at a loss what opinion to form as to the visitatorial powers proposed to be entrusted to the committees of the supervising commission, in the matter of establishing new schools. If it is intended that the Commissioners shall have the power of planting and suppressing schools wherever they please, without consulting the wishes of the inhabitants, it would be necessary to make provision for an appeal from their decision in the event of a conflict between the inhabitants and the committee. An opinion is very prevalent, that the University Commissioners, whose tenure of office expires this year, were disposed to use their authority in a somewhat arbitrary fashion. As regards the personal merit and position of its members, no exception could, of course, be taken to the constitution of the Commission; and having regard to the class from which the new School Commission is to be selected, we cannot doubt that it will be as efficient and as much respected as the body to which we have alluded. But it is not fitting that the entire regulation of the educational requirements of the country should be vested in an irresponsible board, however eminent the qualifications of its members. We observe that, as regards the establishment of new schools, it is proposed to deal with the inhabitants of burghs and populous places in a somewhat different manner from those of rural districts. As regards the former class of districts, the Commissioners are to report to the Sheriff, who is to call a meeting of ratepayers, and if two-thirds of the ratepayers present at the meeting, and the representatives of half the valuation of the parish, object to the establishment of a school, their objection is to receive effect; but unless the proposal is vetoed by a majority, composed as we have stated, the school is to be forthwith established, and the

expense to be divided between the ratepayers and the Government. We can see a reason for withholding the right of veto from the local body in rural districts; for, in these districts, the schoolmaster's salary, in so far as not defrayed by Government, is to be paid by the heritors, whose interests in that matter are not exactly identical with those of the people. But the objections, in point of constitutional principle, to the authority of an irresponsible board are serious. Some machinery, we trust, may yet be devised, which will combine the principle of self-government with the advantages of official supervision.

The only other feature of the scheme which seems to call for special notice, is the retention of the system of Privy Council Grants in connection with Episcopalian and Roman Catholic schools. If the Presbyterian community will insist that the religious instruction to be given in the national schools shall partake of a denominational character, it is but right that the members of other persuasions, whose children are thus excluded from the benefit of the national schools, should receive a separate subsidy. But this, we think, should only be sanctioned as a provisional measure. We would suggest, that the power of making separate grants should be conferred for a limited term of years; at the expiration of which term the subject would require to be again brought under the consideration of Parliament. If this were done, we have little doubt that an arrangement would ultimately be effected, by means of which the children of all persuasions would be enabled to share the benefit of the national school system without any encroachment upon the rights of conscience.

VACATION APPOINTMENTS.

BOX-DAYS.

Edinburgh, 25th February 1862.—The Lords appoint Thursday, the 17th day of April, and Thursday, the 1st day of May, to be the box-days in the ensuing vacation.

(Signed) DUN. M'NEILL, *I.P.D.*

BILL-CHAMBER ROTATION OF JUDGES.

Spring Vacation, 1862.

| | | |
|---|---|-----------------|
| Friday, 21st March, to Saturday, 29th March 1862, | . | Lord MACKENZIE. |
| Monday, 31st March, to Saturday, 12th April, | . | — KINLOCH. |
| Monday, 14th April, to Saturday, 26th April, | . | — JERVISWOODE. |
| Monday, 28th April, to Monday, 12th May, | . | — ORMIDALE. |

HIGH COURT OF JUSTICIARY.

The following are the appointments for the Spring Circuits, 1862 :—

WEST.

LORDS JUSTICE-CLERK AND COWAN.

Inverary.—Tuesday, 15th April.

Stirling.—Friday, 18th April.

Glasgow.—Tuesday, 22d April.

ALEXR. MONCREIFF, Esq., *Advocate-Depute*.

ALEXANDER STUART, *Clerk*.

SOUTH.

LORDS IVORY AND DEAS.

Dumfries.—Tuesday, 8th April.

Jedburgh.—Friday, 11th April.

Ayr.—Tuesday, 15th April.

ADAM GIFFORD, Esq., *Advocate-Depute*.

JAMES AITKEN, *Clerk*.

NORTH.

LORDS ARDMILLAN AND NEAVES.

Perth.—Wednesday, 16th April.

Aberdeen.—Thursday, 24th April.

Inverness.—Thursday, 1st May.

A. B. SHAND, Esq., *Advocate-Depute*.

W. H. BELL, *Clerk*.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

WODDROP v. MAXWELL AND OTHERS.—Feb. 19.

Process—Declarator and Division.

This was an action of declarator and division at the instance of William Allan Woddrop against Sir W. A. Maxwell and others. The subjects sought to be divided are fens and feuing-ground at Little Cowcaddens and Provanside, in the vicinity of Glasgow. The pursuer and defenders have hitherto held the said subjects as their *pro indiviso* property, in the proportion of one-half to the pursuer, and one-sixth to each of the three defenders. The object of the action is to divide the subjects in these proportions. The parties have, by a minute, admitted that the division is practicable, and a remit was of consent made to Mr Thomas Binnie,

architect, Glasgow, to prepare a scheme. Mr Binnie prepared a scheme, making an absolute division; and, on the suggestion of the defenders, he also prepared an alternative scheme, by which one large feu, held by the Edinburgh and Glasgow Railway Company, was still to be held *pro indiviso* by the three defenders. The defenders objected to the first scheme, and asked that the second should be approved of. The Lord Ordinary remitted of new to Mr Binnie to report whether the feu above mentioned could be apportioned absolutely, 'so as to set apart one-third thereof to each of the three defenders as a portion of one-sixth of the subjects to which each of them is entitled.' The pursuer reclaimed, maintaining that the second scheme was incompetent under the original remit, and that the first scheme should be approved of. He further objected to the interlocutor of the Lord Ordinary making the second remit, on the ground that that interlocutor amounted to a remit to Mr Binnie to prepare an entirely new scheme, without disposing of the first scheme. The Court were of opinion that, as the second remit was before answer, no sufficient ground had been shown why the interlocutor making it should be recalled. Their Lordships therefore adhered.

Adv., DUKES v. FERGUSON.—Feb. 19.

Landlord and Tenant—Crop.

This was an advocacy from the Sheriff of Kincardineshire. By the lease of the farm of Inchgray, belonging to Sir J. S. Forbes, which expired at Martinmas 1861, the landlord or incoming tenant had the option of taking the whole or the half of the outgoing crop on certain terms, intimation of the intention of exercising such option being given to the outgoing tenant at least six months before the expiration of the lease. On 19th March 1861, the advocates, John Duke, sen., and John Duke, jun., took a lease of the farm, and, as they allege, the same day gave Ferguson, the outgoing tenant, notice that they meant to exercise the option of taking the outgoing crop. In July following, Ferguson having advertised the crop for sale, the Dukes applied for interdict against the sale. A proof was allowed, and the Sheriff-substitute (Robertson) held it proved that notice of intention to take the outgoing crop had been proved, and therefore granted the interdict. The Sheriff (Bell) recalled the interlocutor, and refused the interdict.

The Court, by a majority, recalled the Sheriff's interlocutor, and granted the interdict.

EDMOND (LORD KINTORE'S TRUSTEE) v. ABEL'S EXECUTORS.—Feb. 20.

Interdict—Landlord and Tenant.

This was an application at the instance of the landlord of the farm of Burnside, in the parish of Kintore, Aberdeenshire, for interdict against the executors of the late tenant of the farm, displenishing it, or 'selling the whole stocking and farm implements, and removing them from the said farm.' The lease does not expire till Whitsunday 1764. The Lord Ordinary on the Bills (Ormidale), on the ground that the statements of the complainer did not set forth a case calling for the strong measure he demanded, refused the interdict; and the Court adhered.

WOOD (MACKINTOSH'S TRUSTEE) v. MACKINTOSH AND OTHERS.—Feb. 20.

Sequestration of Heritable Estate.

In May last the teinds of the lands in the parish of Moy and Dalarossie were sequestrated on the petition of Mr Mackintosh of Geddes. Mr Mackintosh of Holin, and his trustee, applied for recall of the sequestration, on the ground that he had been for forty years in possession of the teinds of his lands in the said parish, and has, at least, a good *prima facie* title to them. The case was fully debated; and the Court recalled the sequestration, with expenses, on the ground that sequestration was not an appropriate remedy where the possession was so long continued.

M'COLL v. SIMONS.—Feb. 21.

Maritime—Collision.

On the 11th April 1860, a collision took place in the Channel between the Cumbræ Isles and Bute, between the sloop 'Matilda M'Coll,' the property of the pursuer, and the steamer 'Rebecca,' the property of the defender, the former vessel being proceeding up, and the latter down the Clyde. A proof having been allowed, there was a great deal of conflicting evidence. The Sheriff-substitute (Bell) decided in favour of the pursuer, finding the defender liable to him in the sum of L.236, 19s. The Sheriff (Alison), on appeal, recalled the interlocutor, and assoilzied the defender.

The Lord President delivered the opinion of the Court, reversing the judgment of the Sheriff, and returning to that of the Sheriff-substitute.

Adv., JACK OR MILLER v. HENDERSON.—Feb. 21.

Reparation—Injury to Person.

This was an advocacy of an action brought in the Sheriff Court at Glasgow by a young girl named Mary Henderson, against Mrs Agnes Jack or Miller, grocer and farmer at Auchinearn, near Glasgow, concluding for damages on account of the defender's cow having attacked and severely injured the pursuer. The Sheriff-substitute (Strathearn) sustained the defence; founding his judgment, so far as the law of the case was concerned, on the Mosaic and Roman systems of jurisprudence, quoting Exod. xxi. 28, 29 :—'If an ox gore a man or woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned and his owner also shall be put to death.' He referred also to the law of England, and held that the law of Scotland was the same. The Sheriff (Alison) reversed this judgment.

The Court recalled the interlocutor, and assoilzied the defender, with expenses. Their Lordships intimated their expectation that expenses would not be exacted from the pursuer.

MEUX AND COMPANY v. REID.—Feb. 21.

Sale—Sufficiency.

The pursuers, Sir H. Meux and Co., brewers, London, and Robertson, Thomson, and Co., their agents and mandatories, sue John Reid, wine-merchant, Exchange Square, Glasgow, for L.39, 15s., for ten hogsheads

of export stout. He refuses to pay, on the ground that the stout furnished was not export stout, which he ordered, but was too brisk, and burst his bottles, and was in great part lost, and quite unfit for exportation to a warm climate. Sheriff-substitute (Strathearn) sustained the defence, but Sir A. Alison altered, holding that the stout became too brisk, after it left the pursuers' premises, *ex damno fatali*, or from its being bottled at an unseasonable time; and, at any rate, the defender did not return or reject it soon enough.

The Court recalled the Sheriff's interlocutor, and returned to that of the Sheriff-substitute, holding that the stout was not export stout, and, therefore, not the article ordered by the defender.

COUSTON *v.* MILLER.—*Feb.* 27.

Writ—Reduction—Issue.

This was a reduction of a discharge of an action on the grounds—(1), That the witnesses did not see the pursuer sign, nor hear him acknowledge his subscription; (2), That the deed was impetrated by fraud and circumvention, while the pursuer was in a state of intoxication; and, (3), That he signed it under essential error, caused by the misrepresentations of the defender, to the effect that the pursuer's expenses would be paid, while a clause appears in the deed discharging the claim for expenses. Three issues, embracing each of these three grounds, were proposed by the pursuer, and approved of by the Lord Ordinary; but the defender objected and maintained, that there was no matter on the record for the last two issues, the only allegation being that the pursuer was 'affected by drink,' 'under the influence of drink,' and in a state of 'partial incapacity from the use of strong drink.' The defender further maintained that the pursuer was not entitled to both of these two last issues, because the essential error of the one embraced the ground in the other.

The Court were of opinion that the pursuer was entitled to all the three issues.

SHAW *v.* THE PAROCHIAL BOARD OF THE BARONY PARISH OF GLASGOW, AND OTHERS.—*Feb.* 27.

Public Officer—Contract.

This was an action raised in February 1861 by James Shaw, Kelvinaugh Street, Glasgow, to have it declared that he was entitled to exercise the functions and to enjoy all the rights and emoluments of collector of the poor-rates in the Barony parish of Glasgow, in virtue of his election to that office on the 28th May 1860, by the Committee of Management of the said parish. The annual emoluments of the office are about L.750. The Parochial Board maintained that the appointment of Mr Shaw was made during pleasure only, and that it was terminated and superseded by the appointment of another person, Mr Meek, in August 1860. The Board also contended, that it was incompetent for them to make a permanent, or even an annual, appointment, except in the month of August, when they lay on their assessments for the year. The Lord Ordinary (Mackenzie) found that the pursuer's appointment as collector was for a year from May 1860; that he was entitled to exercise all the functions and enjoy the emoluments belonging to the said office during that period; and that he could not be summarily removed from his office

during that period without cause assigned. The case having come before the First Division on a reclaiming note,

The Lord President,—It was ruled that Shaw's appointment was for a year, from May 1860, and that such appointment could competently be made by the Parochial Board. Shaw was, therefore, entitled to the emoluments of the office for that period. The Lord President did not think it necessary to express any opinion as to whether Shaw was entitled to exercise the functions of the office if he had become disagreeable to the Board.

Adv., DREW v. MACKENZIE.—Feb. 28.

Label—Privilege—Inuendo.

This was an advocacy from the Sheriff of Lanarkshire of an action at the instance of Peter Drew, merchant in Glasgow, residing at Ardencaple House, Row, Dumbartonshire, against Peter Mackenzie and Co., printers and publishers at 36, Miller Street, Glasgow, of the newspaper called the *Glasgow Gazette*, or *Old Loyal Reformers' Gazette*, Glasgow, and Peter Mackenzie, residing at No. 19, Buckingham Terrace, Glasgow, the only known partner of said concern, and editor and printer of said newspaper, as such partner, and as an individual. The conclusions of the summons were that the defenders ought to be decerned to pay to the pursuer the sum of L.40 sterling, as restricted in name of damages and *solatium*, for the loss and injury sustained by the pursuer in consequence of the defenders having, in an editorial article, printed and published by the defenders on the 4th day of August 1860, entitled 'The Notable Case of the National Exchange Company of Glasgow against Peter Drew and Mathew Dick,' falsely, calumniously, and injuriously represented and held up the pursuer to scorn, ridicule, and contempt in the eyes of the public, and stated or insinuated, falsely, calumniously, and injuriously, and in violation of the defenders' duty as public journalists, of and concerning the pursuer and the above-named Mathew Dick, that they 'were sturdy, bold, and unblushing repudiators;' meaning thereby that the pursuer, *inter alios*, was guilty of gross dishonesty and breach of faith in his transactions; also that 'they' (viz., the pursuer and said Mathew Dick) 'acted like thimble-riggers,' thereby accusing the pursuer of being a cheat and swindler, and guilty of criminal conduct; and, further, that the pursuer was a person destitute of honour and moral principle, whereby the pursuer has been greatly injured in his character, feelings, reputation, and credit as a merchant; and which injury was aggravated and increased by the defenders' unwarrantable refusal to insert in his said newspaper a statement furnished to him by the pursuer, in reply to and in refutation of said article.

The Sheriff-substitute assoilzied the defenders from the conclusions of the actions; but Sheriff Alison altered and decerned for L.5, 5s. of damages, on the ground that the defenders, although not actuated by improper motives, had exceeded the bounds of moderation and fair criticism. To this interlocutor a majority of the Court adhered.

The Lord President dissented, holding that the conduct of Messrs Drew and Dick, in bringing a charge of fraud against gentlemen of respectability and position, was a legitimate subject for public discussion and criticism. The defender's commentary was certainly somewhat rough;

it was even relentless and vehement; but it was not what the pursuer represented, or what their Lordships were disposed to hold. The circumstance that the defender had not published a report of the trial was certainly unfavourable to him, but it was not sufficient to prevent him from commenting on it. He would be quite entitled to criticise a book which he could not engross.

M'DONALD v. BEGG.—March 1.

Reparation—Slander—Veritas.

This was an action of damages for slander at the instance of David M'Donald, grocer, Lothian Street, Edinburgh, on account of the defender, John Begg, distiller, Lochnagar, having, on 4th May 1861, written a letter in which he said of the pursuer M'Donald, 'If he was as well known in Edinburgh as I know him, or the people of Dunfermline, he would have been kicked out of the town long ago. He is about one of the worst characters I ever knew, and I suppose his brother in the Grassmarket not much better.' The defender proposed to take a counter-issue of justification on the ground of the pursuer's having been convicted, on 25th March 1861, of a breach of his certificate, by permitting women of notoriously bad fame to meet in his premises in the Lawnmarket, Edinburgh.

The Court were of opinion that the counter-issue could not be granted. It was not a justification of the alleged slander.

EARL OF MORAY v. M'DIARMID.—March 5.

Process—Teind Case.

The Rev. H. M'Diarmid, minister of Callander, having obtained an augmentation of stipend, and an interim scheme of locality having been approved of by the Lord Ordinary, the reclainer objected that certain lands of his, not teindable, as being forest lands, had been included, and he reclaimed against the interim scheme.

The Court having considered minutes of debate, decided that a reclaiming note against an *interim* scheme of locality was incompetent.

App., **SETON v. WINK (CROLL'S TRUSTEE).—March 6.**

Bill of Exchange—Value—Bankruptcy.

This was an appeal from a delivery of the Sheriff of Lanarkshire upon a claim lodged by the appellant, Thomas H. Seton, Glassford Street, Glasgow, in the sequestration of David Croll, pawnbroker, 159, Holme Street, Glasgow. The claim was for L.100, and was founded on a promissory-note signed by the bankrupt and his wife in favour of a Mr George Sim, who indorsed it without recourse to the appellant. The trustee refused to rank the claim, on the ground that the promissory-note had been granted and indorsed, without value, and had in point of fact, though not *ex facie*, been granted after the date of the sequestration. The Sheriff affirmed the judgment of the trustee. Seton then appealed to the Court of Session; but their Lordships unanimously refused the appeal.

BOE AND OTHERS v. ANDERSON AND OTHERS.—March 7.

Trust—Charitable Bequest—Foreign Law.

The late Stephen Henderson, a domiciled citizen of Louisiana, but a native of Dunblane, who died in 1838, left, among other bequests, the following:—'Two thousand dollars per annum, to be paid to the poor of

the town of Dunblane, in Perthshire, N.B., this sum to be divided by the resident minister of the Presbyterian Church, and the two highest civil officers in the town, to be paid upon due proof of their acceptance of the trust, say 2000 dollars. Two thousand dollars for the erection of a school-house in the town of Dunblane for ten years only, and for the purpose of educating of the poor, this being the place of my birth.' These bequests were claimed by the Established minister of the parish, and by the Sheriff-substitute and Sheriff-clerk depute of Perthshire, residing and officiating in Dunblane. In order to make good this claim, the present action was instituted by them against the executors and heir-at-law of the testator, who were subject to the jurisdiction of the Court of Session. After a lengthened litigation, a case was prepared for the opinion of Louisiana counsel as to the validity of the bequests by the law of the testator's domicile. The case was submitted to Mr Spofford, counsellor-at-law, New Orleans, who returned an opinion, in which he said :—' If the town of Dunblane constitutes a municipal corporation, and if the pursuers are its administrators, or entitled to any superintendence over the poor of the town, there can be no doubt of the validity of the bequest or bequests. . . . But substitutions and *fidei commissa*, and the trusts of the English law, are prohibited in Louisiana. . . . I find no case of a legacy to such a class of persons as the poor of a community, where an appointment of trustees for them by the testator, other than the official administrator of the corporation within which the designated class of beneficiaries dwell, has been held good. . . . If, then, Dunblane is a corporation, and the pursuer can, in any just sense, be styled administrator thereof, the legacy is valid ; but if Dunblane is not a corporation, or does not form part of a municipal corporation, of which the pursuers may be styled administrators, then no statute of Louisiana, and no adjudged case that has fallen under my observation, would enable the pursuers to stand in judgment in the Courts of Louisiana as the recipients of this legacy. It seems to me that a legal bond between them and the poor of Dunblane would be wanting. The testator could not make them the representatives of the poor by the mere force of his will.' Further probation having been renounced by the parties, the case was to-day advised.

A majority of the Court were of opinion that this question of the validity of the bequests must be decided according to the law of Louisiana, the testator's domicile. That being so, there could be no doubt that under that law, as stated in the opinion of the counsel before whom the case had been laid, the bequests claimed by the pursuers were invalid. The town of Dunblane was not a municipal corporation, the pursuers were not its administrators, nor had any superintendence over the poor of the town.

Lord Deas dissented. He was of opinion that the validity of the bequests did not fall to be decided by the law of Louisiana, but by the law of Scotland, where the testator had realized his trust. By the law of Scotland there could be no doubt that it was perfectly competent to constitute such a trust as the present ; and he (Lord Deas) was satisfied that the pursuers had made out a sufficiently good title to insist in the action, and vindicate the rights of the poor beneficiaries.

The Court dismissed the action.

RICHARDSON v. HAY AND OTHERS.—*March 12.**Property—Possessions—Fishing.*

Sir J. Richardson of Pitfour is proprietor of certain lands on the north bank of the river Tay; and by the present action he seeks to declare that he has a right of salmon-fishing in the Tay *ex adverso* of his lands, and, in particular, at the fishing stations called the 'Wonder,' and the 'Isle of Peat,' in the south channel of the river. The action is directed against Mr Balfour Hay of Mugdrum, and his tenants. A long proof was taken, and the Lord Ordinary (Mackenzie) assolized the defenders. *Per Curiam*: The pursuer here had no express grant of the salmon-fishings which he now claimed. It was, therefore, necessary that he should prove possession; but in that he had entirely failed. There was no evidence that the pursuer had ever possessed the fishings at these stations. It might be possible for the proprietor of lands on the north of the Tay to prove possession of fishings on the south bank at the point where the river is several miles broad; but very distinct evidence of such possession would require to be produced. There was certainly none such led by the pursuer.

M'GILLIVRAY v. SOUTER.—*March 12.**Succession—Clanship.*

In this action of declarator, Neil John M'Gillivray of Dunnaglass, seeks to have it declared that under the subsisting destination of the lands of Faillie and others, no one is entitled to succeed as heir to the deceased John Lachlan M'Gillivray, who is not a member of the clan of Clan Chattan. The cause has been often before the Court under reclaiming notes, minutes, revised minutes, and additional minutes, explanatory of what a clan is, and what the Clan Chattan is. Lord Ordinary Ardmillan decided against the contention of the pursuer; and the Court now unanimously adhered.

GAVIN CRAIG v. SCOTT.—*March 14.**Reparation—Injury to Person.*

The pursuer in the present action, which comes by advocacy from the Sheriff Court of Lanarkshire, is a joiner, who was injured by the fall of a temporary scaffold used in taking down the centres of a viaduct, near Coatdyke. The defender, Mr Scott, was his master, a contractor for certain works on the Monkland Railway. Sheriff-substitute Logie decerned against him for L.50, and Sheriff Alison adhered, except as to damages, which he reduced to L.49. The defender advocated, and maintained—(1) That he was not in fault; (2) that the fall of the scaffold was caused by the inspector of the Railway Company using a lever and bringing it down; and (3) that it was the fault of the pursuer himself and of his fellow-workmen rushing to one place of the scaffold; or, at least, of the foreman, who directed the putting up of the scaffold, and who was a fellow-workman, in the sense of the English decision of *Wigmore v. Jay*. The Court overruled all these pleas, and adhered.

FAIRLEY v. THOMSONS, RITCHIE, AND CRAIG.—*March 14.**Sale—Breach of Contract—Delivery.*

This was an action of damages for breach of contract of sale, raised at the instance of W. and G. Fairley, wholesale ironmongers in Glasgow,

against Thomsons, Ritchie, and Craig, accountants there, and Drysdales and Company, warehousemen, Cochrane Street, Glasgow, concluding for L.199, 11s. 3d. The circumstances of the case were shortly these:—Cowie, who was a general merchant in Tillicoultry, became bankrupt in August 1857; Ritchie, his trustee, sold his stock in one lot to the defenders, Drysdales and Company, who resold the same to the pursuers, through their factors or agents, the other defenders. The transaction was completed on the 14th of October 1857; and although in the written bargain there was no time fixed for payment of the price or delivery of the stock, the parties had the 19th of October in contemplation for a settlement. In the meantime, Cowie was in possession of the premises where the stock lay, and this was known to the pursuers when they entered into the sale. On the 19th October, Cowie refused to give up the keys of the premises, and the defenders had to adopt judicial proceedings against him to obtain possession. These were resisted by Cowie; and it was not till the 4th of November that Drysdales and Company were in a position to offer delivery to the pursuers. This they immediately did; but the pursuers then refused to take delivery or pay the price, on the ground there had been a breach of contract in not giving delivery sooner, whereby they had been prevented opening the premises in Tillicoultry for a cheap sale, which they had advertised to begin on 22d October. They forthwith raised this action of damages before the Sheriff of Lanarkshire, concluding against both sets of defenders as being jointly liable. The Sheriff (Alison), on appeal, held that there had been a breach of contract proved without sufficient justification, found damages due, but modified the same to L.10; and as there had been a tender of L.12, he found the pursuers liable in expenses, with the exception of those incurred by Thomsons, Ritchie, and Company. To-day, the Court pronounced judgment, adhering to the interlocutor of the Sheriff on the merits, but reversed it as regards expenses, and allowed the defenders their whole expenses.

SWINTON *v.* SWINTON.—*March 15.*

Legitimacy—Proof.

In this case the question of the pursuer's legitimacy having been raised incidentally, the Court were of opinion that, with the defender's consent, the matters of fact in regard to the legitimacy should not be ascertained under an issue sent to a jury, but by a proof on commission before the Lord Ordinary without a jury.

CULLEN *v.* SIR WILLIAM JOHNSTON.—*March 18.*

Process—Jury Trial—Delay.

This was an action at the instance of Mr Cullen, W.S., against Sir William Johnston and others, arising out of the affairs of the Edinburgh and Glasgow Bank. The Court, some time ago, assoilzied the other defenders, Mr Kerr and the representatives of Mr Thomson, two former managers of the bank; and the interlocutor assoilzieing the defender is now under appeal. The issues against Sir William Johnston were approved of on 16th February 1861; and more than a year having since elapsed, Sir William now moved the Court to dismiss the action in terms of the 45th section of the Act of Sederunt, 16th February 1841. For Mr

Cullen, it was maintained that the dependence of the appeal was a reasonable ground for his delay in going to trial. The Court were of opinion that there was not sufficient ground for dismissing the action.

SECOND DIVISION.

WILLIAM INGLIS v. M'INTYRE AND MAIR.—Feb. 14.

Reparation—Wrongous Use of Diligence.

This is an action of damages for use of a poinding alleged to have been wrongful, on the ground that the debtor had tendered payment of the debt—viz., L.2, 2s., and 10s. 6d. as the dues of extract. The case went to trial, and the jury returned a special verdict finding that these sums had been tendered, but only on condition that the extract decree should be given up; that the clerk and messenger to whom the tender was made refused to give up the extract except on payment of the expenses of the charge. Two of the defenders, the creditors, consented to this verdict being entered up against them, trusting to save the costs on account of the smallness of the sum found due. The third defender, Mr Taylor, the law-agent, maintained that the verdict should be entered up as a verdict for him as defender. The Court were of opinion that the tender made by the pursuer was not a proper tender, in respect that he was not entitled to adject the condition that the extract decree should be delivered up to him. The extract decree was not, in the proper sense, a document of debt like a bill, which the defender had any interest to obtain possession of in return for payment. It was not a principal document of debt, but rather a certificate, that a decree existed. It was useless to the debtor, and he suffered no disadvantage from its remaining in the hands of the creditor. The Court, on the other hand, were all agreed that the debtor was not bound to tender the expenses of the charge or any other sum, beyond what was included in the charge. For these expenses, separate action must be raised by the creditor, and the creditor had an interest to retain the extract decree, as it might be useful evidence in that action that such expense had been incurred. The verdict was therefore entered up for the defender, with expenses.

Susp., SCOULLER v. M'LAUCHLAN.—Feb. 25.

Justice of Peace—Pawnbrokers Act.

The respondent pledged several yards of merino with the complainer, who is a pawnbroker in Glasgow. This merino was taken possession of by the police. Subsequently, the respondent gave up the pawn-ticket, with the sum advanced, and interest, to the complainer, and claimed delivery of the merino. Delivery not being made, she presented a petition to the Justices of Lanarkshire, under the 14th section of the Pawnbrokers Act (39 and 40 George III., cap. 99), for an order on the pawnbroker to deliver the goods, or to find him liable in the value. The Justices ordained the suspender to make payment of the whole of the goods, with expenses. The complainer suspends, *inter alia*, on the ground that the Justices, in pronouncing this judgment, have not adhered to the terms of the statute. The 14th section provides, that in case a pawnbroker shall refuse to deliver up the goods pawned, the Justices shall direct the goods

to be delivered up, and if the pawnbroker 'shall neglect or refuse to deliver up, or make satisfaction for the goods,' the Justices are authorized to commit the person 'so refusing to deliver up and make satisfaction for the same' to prison, 'until he shall deliver up the goods,' 'or make such satisfaction or compensation as such Justice or Justices shall adjudge reasonable for the value thereof.' The Lord Ordinary (Ormidale) passed the note on the ground of the Justices' decisions not being conform to the 14th section; but the Court recalled that judgment, and remitted to the Lord Ordinary to hear parties on the other grounds of suspension.

MORISON AND OTHERS v. M'LEAN'S TRUSTEES.—Feb. 27.

New Trial—Reduction—Expenses.

The pursuers in this case brought an action for the purpose of reducing the trust settlements of the late Colonel M'Lean, on the grounds of—1. insanity; 2. facility and circumvention; 3. imperfect execution. The case went to trial before a jury, and a verdict was returned in favour of the pursuers on all of these points. The defenders moved for a new trial, on the ground that the verdict was against evidence.

Lord Cowan delivered the judgment of the Court, granting a new trial, on the ground that the verdict was against the evidence on all the three questions submitted to the jury in the issues. The pursuer contended that the expenses of the former trial should be allowed to him. The defender opposed this.

The Lord Justice-Clerk: In the special circumstances of this case, we think the pursuers should have the expenses of the former trial; but we do not recognise any general rule requiring us to do so.

Susp., LUNDIE v. BUCHANAN.—Feb. 27.

Pawnbrokers Act—Forfeiture.

On 12th August 1858, Mary Buchanan pledged with the suspender, who is a licensed pawnbroker in Glasgow, a China or Canton crape shawl for a loan or advance of 8s. 6d. By the 17th section of the Pawnbrokers Act, it is provided that goods pawned shall be deemed forfeited, and may be sold, at the expiry of a year from the date of pawning. By the 19th section, the pawner of the goods may at any time, before the expiry of the year, give notice to the pawnbroker not to sell the goods for three months after the expiry of the year. By the 14th section, if the pawner, within the year or the extended period of fifteen months, shall tender the principal money borrowed and profits thereon, and the pawnee shall thereupon, without showing reasonable cause, refuse to deliver up the goods so pawned, the Justices are empowered, on complaint to them, to order the goods to be delivered up. Before the expiry of a year from the date of pawning the shawl, Mary Buchanan gave notice to the suspender not to sell it for the period of three months from the end of the year. She did not, however, require the shawl to be delivered up to her, and make the statutory tender of the money advanced and profits within the fifteen months, which expired on the 13th November 1859. On 18th November she offered to redeem the shawl, and required the suspender to return it; but he refused to do so, on the ground that it had become forfeited. A complaint was made to the Justices of Lanarkshire, who ordained Lundie to deliver up the shawl, or make payment of L.1, 10s. as its value.

Lundie having brought a suspension of this judgment, the Lord Ordinary (Mackenzie) found in point of law that, as the shawl was pawned for a sum under ten shillings, and was not redeemed by the respondent within the statutory period of fifteen months from the time when it was pawned, it was forfeited, and became the absolute property of the suspender under the said Act; that he was not bound to restore it to the respondent, or to account to her for its value, or even for any surplus which might arise in the event of a sale, after satisfying the principal sum advanced and interest thereon; and therefore suspended the sentence. Mary Buchanan having reclaimed, the Court recalled the Lord Ordinary's interlocutor; but sustained the suspension on the ground that the Justices had no jurisdiction to entertain the complaint under the 14th section, in respect that Mary Buchanan had not required the suspender to deliver up the shawl and made the statutory tender of the advanced money and profits within the period of fifteen months.

DUKE OF ATHOLE *v.* M'INROY.—*Feb. 28.*

Property—Deer Stalking.

The present action was brought by the Duke of Athole, the proprietor of the Forest of Athole, against Mr M'Inroy, the proprietor of the lands of Lude, which lie in the vicinity of the forest, for the purpose of having it declared—(1) that the defender is not entitled to kill deer on the lands of Lude; (2) that the pursuer is entitled to go upon the said lands for the purpose of killing deer thereon, or at least for the purpose of driving back from the said lands any deer which may stray from the forest; and (3) that, at all events, the pursuer is entitled to go upon that part of the defender's lands immediately adjacent to the forest, in order to drive back any deer that may stray from the forest. The Lord Ordinary (Mackenzie) decided in favour of the defender, and the Court adhered. *Per Curiam*: The pursuer had contended that, as a keeper of a Royal forest, he was entitled to take all means to preserve the Royal deer wherever they might be found. This claim was without foundation in law. If it could be said that a deer was a Royal beast, or that deer-killing was *inter regalia*, there might be some ground for the claim of the noble Duke; but Lord Stair was the only authority who had suggested the idea that deer-killing was *inter regalia*. In one passage he had said that proprietors might drive the deer off their lands, but might not kill them. Stair was entirely unsupported, either by statute or authority. The right to kill deer upon his own lands belonged to every proprietor.

HARKES *v.* MOWAT.—*March 1.*

Reparation—Slander—Veritas.

This is an action of damages in which the pursuers conclude that the defender should be ordained 'to make payment to each of the pursuers of the sum of L.300, as the damages and solatium due.' The damages are for slander against both pursuers, in respect of the defenders having on one occasion stated that they were 'robbing, swindling rascals,' and having on another occasion made a charge of horse-stealing against them to the Fiscal. The defender pleaded, in justification, that the pursuers had sold a horse given to them in loan by him, and proposed a counter-issue

to that effect. The Lord Ordinary (Ardmillan) having reported the issues for adjustment,

The Court disallowed the counter-issue, in respect that there was no sufficient justification stated on record. The pursuers having proposed to combine their claims of damage in the same issues, the Court raised the question of the competency of granting issues in the state of the summons and record, and of the form in which issues should be framed; and decided that the pursuers were entitled to issues, but that separate issues must be taken by each.

Pet., TURNER'S TRUSTEES FOR AUTHORITY TO RENOUNCE LEASES.—
March 1.

Trust—Nobile Officium.

This is a petition by tutors-nominate for authority to renounce certain leases to which the pupil succeeded under his father's trust settlement. The leases contain onerous obligations on the tenant as to the improvement of the lands, which would require a large outlay. The petitioners stated that they had not sufficient funds to enable them to carry on the leases, and that, even if they had funds available, it would be detrimental to the pupil's interests to carry on the leases, and that the landlord was willing to accept a renunciation. The Court remitted to Mr Dickson, of Saughton Mains, to inquire as to the effect of the proposed renunciation on the interests of the pupil-heir, and he reported that it would be decidedly more beneficial for the interest of the pupil that the tutor should renounce, and that the condition of the leases would require a larger sum to be outlaid than the pupil possessed. Thereafter

The Court granted the authority craved, on the ground that, as the pupil had not sufficient funds to carry on the leases, it was absolutely necessary to renounce them.

MEIKLE AND OTHERS, OWNERS OF THE 'ST ELMO,' v. SNEDDONS.—March 4.

Reparation—Wrongous use of Diligence.

This was an action of damages and repetition, at the instance of the owners of the steamship 'St Elmo,' under the following circumstances:—In 1859, when the ship was under charter to Zelling and Hignard of Nantes, the captain bought a cargo of coals from the defenders to ship to France. Subsequently the vessel returned to this country, and while lying in the harbour of Ayr was arrested by the defenders for L.32 odds, being an alleged balance of the price of coals, upon a summons against Captain Boarder 'as representing the owners.' In order to get the ship free to pursue her voyage, the pursuers paid under protest. This action was raised for L.500 damages, and repetition of the amount paid under protest. The defenders objected to any issue being granted—(1) because no loss had been suffered by the pursuers, as the detention only injured the charterers; (2) it was a proper use of diligence in the circumstances.

The judges concurred in holding that, as the pursuers had averred that the warrant was illegal, and that damage had followed from the illegal arrestment, he was entitled to an issue. The amount of the damage was entirely a question for the jury. The following issue was approved of:—'Whether, on or about 2d August 1859, the defenders wrongously arrested the said screw-propeller steamship or vessel called the 'St Elmo,'

of Glasgow, the property of the pursuers, while lying in the harbour of Ayr, without a legal warrant—to the loss, injury, and damage of the pursuers?’

INSPECTOR OF KILWINNING v. INSPECTOR OF MONKTON.—March 7.

The present action was brought in the Sheriff Court of Ayrshire by the Inspector of Poor of Kilwinning, to recover sums expended by him on account of Charlotte Donaldson, a lunatic, from the Inspector of Monkton, the parish of her birth. The lunatic is the wife of James Donaldson, a labourer, who had resided with her in the parish of Kilwinning from Martinmas 1855 till August 1859, when she was removed to an asylum. Donaldson is a native of Ireland, and has never acquired a settlement in Scotland, though he has resided in it for several years.

The defence was, that the lunatic, being a married woman, had no settlement but that of her husband; and the defender maintained that the fact of the husband not having a settlement in Scotland did not affect the question. The Sheriff-substitute and Sheriff both sustained the defence. The pursuer advocated; and this Division ordered cases to be laid before all the judges. The consulted judges were all of opinion that, in reference to the present case, the defence was well founded.

At advising, the Lord Justice-Clerk said that he agreed with the consulted judges in holding that the wife had no settlement apart from her husband. He could not, however, reconcile this opinion with the decision in the case of *Hay v. Skene*, which proceeded on grounds which applied equally to the present case. He agreed with Lord Moncreiff, who was in the minority in that case.

STIRLING'S TRUSTEES v. SIR SAMUEL HOME STIRLING.—March 7.

Entail—Improvement Debt—Res Judicata.

The present action is brought by the late Sir Samuel Stirling's trustees against his heir of entail, for payment of certain improvement debts. The pursuers found on two decrees of declarator in 1835, alleged by them to constitute improvement debts under the Act 10 Geo. III., cap. 51, and contend that, by virtue of the 26th section of the statute, these decrees not having been appealed within twelve months are now final. The defender objected that preliminary notice of intention to make the improvements had not been lodged with the Sheriff-Clerk in terms of the statute; that the decrees bore on their face that the accounts and vouchers of the sums spent, lodged with the Sheriff-Clerk, were under the hands of the pursuers, Sir Samuel Stirling's trustees, and not subscribed by the proprietor himself, as required by the 12th section of the statute. 3. That both the decrees bore that the sums contained in them had been in part expended in 'repairing farm-houses and offices on the unentailed estate,'—a disbursement not authorized by the Act as a charge upon the estate.

The Lord Ordinary (Kinloch), while holding that the decrees were protected by the clause of finality against all extrinsic objections, found that they were *ex facie* at variance with the Act, in respect of the objections stated, which he sustained.

The Court recalled the Lord Ordinary's interlocutor, and found that the first and second objections were not so established by the terms of the decree as to be fatal to it; and with reference to the third objection, that

the improvement debts sought to be recovered appeared *ex facie* of the decree to be composed in part of sums expended in repairing farm-houses and offices on the entailed estate, and that sums so expended were not, within the meaning of the statute, such a debt as could to any extent form a charge on the entailed estate. Parties were appointed to be heard on the question whether the sums so expended could be distinguished, and the decree made effectual for the balance.

MILLIGANS v. WALKER.—*March 7.*

Succession—Taciturnity.

The deceased George Walker was, at the time of his death, on 10th January 1829, tenant of the farm of Cairn of Enrick, and possessed crop and stocking and farm implements, and household furniture to a considerable amount, besides money in bank. The defender's sons carried on the farm after his death, and intromitted with and took possession of the crop and stocking, farm implements and household furniture. The sum of money in bank belonging to his estate was divided among six of his children, one of whom, a daughter, the pursuers represent. They sue in this action of count and reckoning for her share of her father's estate.

The defenders pled, *inter alia*, that the claim had been extinguished by taciturnity, and in the accounting claimed among other deductions a sum as recompense for services rendered on the farm during their father's lifetime. The Lord Ordinary (Kinloch) held that lapse of time would not by itself presume settlement. There must be circumstances, varying it may be in every case, which fairly, and in a sound practical view, infer a settlement having been come to; otherwise, the legal right must be held still to subsist. Here it was distinctly proved that no settlement ever took place. The judgment being reclaimed against, the Court altered and remitted.

COUSIN AND OTHERS v. GEMMEL.—*March 8.*

Proof of Tenor—Clause.

This was an action brought for the purpose of proving the tenor of an old deed of conveyance, which was produced in a very dilapidated condition. The tenor of the whole deed was proved, with the exception of the clause of warrandice.

The Court held that they could not supply that clause, and the case was continued, to allow the pursuer to restrict the libel.

MACKENZIE v. MACKENZIE.—*March 11.*

Entail—Validity—Irritant Clause.

The present action was brought by Sir Kenneth Smith Mackenzie, heir of entail in possession of the lands of Gairloch, to have it declared that the entail of said lands was invalid. The ground on which the action was laid was, that while the supposed deeds of entail contain a prohibition against a variety of acts, including sales, there was, in the irritant and resolute clauses, a general declaration, followed by a particular enumeration of the prohibited acts, without specifying sales; and therefore that the entail was void, not only as regards sales, but in every other respect, in terms of the 11th and 12th Vict., cap. 36. The Lord

Ordinary (Ormidale) held that there was no distinction in principle between the present case and the Balliliesk case (*Rennie v. Horne*, March 13, 1838), decided by the House of Lords; and in conformity with that decision gave judgment in favour of the pursuer, setting aside the entail. The defenders having reclaimed, the Court adhered.

M. P., MALTMAN'S FACTOR *v.* MRS COOK AND OTHERS.—*March 14.*

Presumption of Life—Succession.

This action was brought for the purpose of determining who were the parties entitled to the succession of William Maltman, who died at Elie in 1854. The question arose whether his brother Gavin survived him, and was still in life, and every endeavour to discover Gavin was made, by advertisement and otherwise, without result. Mrs Cook (one of the claimants) having averred that he was dead, a commission was granted to Mr Abercromby Dick, advocate, to proceed to America and take proof. It appeared that Gavin Maltman was born in Scotland in 1792; that he went abroad when young, and had resided in various colonies—in Jamaica in 1828; in Halifax, Nova Scotia, in 1831; in Yarmouth, Nova Scotia, in 1831; in Prince Edward's Island in 1846; and in Pugwash, Nova Scotia, in 1848. He was about fifty-seven when last seen by any of the witnesses relied on, and that was in 1849; the case attempted to be made on the proof was, not that Gavin Maltman had been proved to have died at any specified time or place, or had been proved to be actually dead, though the time and place of death might be unknown, but that, looking to the circumstances deponed to by the witnesses in Nova Scotia, to the proved age, intelligence, habits, and health of Gavin Maltman in 1848 and 1849, to the sudden and entire cessation of his correspondence, and to the persevering and extensive system of advertisements adopted by the claimants, the presumption in favour of life had been overcome, and it must now be assumed that he had died since 1849 and prior to March 1854 (when his brother William died), or, at all events, that he is now dead.

The Lord Ordinary (Ardmillan) having considered the proof, found that no satisfactory evidence of the death of Gavin Maltman had been adduced, and that the presumption in favour of his life had not been overcome, and therefore superseded further consideration of the claims in the competition. The Court adhered.

Pet., GEDDES.—*March 14.*

Process—Recall of Inhibition.

This was a petition by William Geddes of Highfield, near Tain, for recall of an inhibition which had been used against him, proceeding on the dependence of a summons at the instance of his wife. The summons concluded to have it found and declared that the petitioner was not entitled to sell or alienate any part of the heritable property disposed in liferent, to the pursuer, by a deed dated 6th January 1859, without her consent; and also concluding to have the petitioner, Mr Henry Tod, W.S., the custodier of the deed, ordained to register it in the Register of Teinds, and in the General or Particular Register of Sasines, in terms of the clause of registration therein contained. The petitioner averred, that the said deed was of a testamentary character, was revocable by him, and

had been revoked. The respondent averred that in December it had come to her knowledge that the petitioner had been making attempts to sell his property of Highfield, concealing from intending purchasers the fact of his having already disposed of it in his post-nuptial settlement, being the deed in question. The defences in the action admitted that it was the defender's purpose to raise money on his property and return to Australia.

The Court, by a majority, held that, as the deed was peculiar, the wife was entitled to have the protection of the inhibition, to prevent alienation, until the nature of her rights was ascertained.

ADDIE v. YOUNG.—*March 15.*

Landlord and Tenant—Removing.

The present action was brought by Robert Addie of View Park, in the Sheriff Court of Lanarkshire, against John Young, a tenant of two parks belonging to the pursuer, for the purpose of having him decerned to remove therefrom at Martinmas 1861. The defence was, that the parks had been let to the defender for seven years, from Whitsunday 1855, in terms of a missive of lease produced, and that therefore he was not bound to remove till Whitsunday 1862. The Sheriff-substitute and Sheriff sustained the defence. The pursuer advocated; and the case having come before this Division, the pursuer pleaded that, as landlord, he was entitled to access to the arable ground at Martinmas, to prepare it for next crop. The Court adhered to the Sheriff's judgment. *

Cessio, SHILETO.—*March 20.*

Bankruptcy—Forum competens.

The pursuer applied for the benefit of cessio. He designed himself a commission agent, and dealer in London and Edinburgh, and it was stated that he had carried on business in London for a number of years, and was in the habit also of transacting business in Edinburgh, where he was now domiciled. He came to Edinburgh in the month of December last, and, after a residence of forty days, raised the present process. From the state of affairs given in by the pursuer, it appeared that his liabilities amounted to about L.2000, and that his assets were L.423. Of the L.2000 of debts, it was stated that the creditors held securities to the extent of about L.1300, and that of the assets only L.43 was now available, the rest having been lost to the pursuer, in consequence of the bankruptcy of one of his debtors. All the creditors resided in England, and the pursuer had no property whatever in Scotland. He had granted a bill on 3d December 1861, for L.12, 10s., to one of his English creditors, and he was charged to make payment. On the expiry of the charge a fiat was obtained, but it was not put in force.

The Court, in the circumstances, held that, as there was no reason stated why the pursuer did not apply to the Insolvent Court in England, where all his creditors resided, and all his property was situated, the action should be dismissed.

M. P., FYFE'S TRUSTEES.—*March 20.*

Trust—Assignment—Bill of Exchange.

The fund *in medio* in this multiplepounding is a sum of three thousand pounds, left by a testator to his daughter in liferent, and to two other

parties in fee. The liferentrix died in April 1858, and the fund then vested in the fiars. This action was raised in December of the same year, and one of the fiars was sequestrated in July 1860. The present competition is between the trustee on her sequestrated estate, and two parties claiming to be her assignees, under assignments completed before sequestration. One of the alleged assignees founded on a deed of agreement dated and intimated in October 1858, by which the fiar consented that a certain sum should be paid over to the claimant by the testamentary trustees, and authorized and directed the trustees to pay it; and this claim, founded on the agreement, was lodged in the multiplepoinding in March 1859, more than a year prior to the sequestration.

The Lord Ordinary (Kinloch) held that the assignation was absolute and sufficient, and was completed before the sequestration, the production of the minute agreement in the process being judicial intimation. The Court unanimously adhered.

The other claimant founded on a document addressed by the fiar to the testamentary trustees, in the following terms:—‘L.150. Edinburgh, 12th March 1856.—Three months after date pay to A. B., or to his order, within the office of the Caledonian Banking Company, the sum of L.150, for value received. (Signed) B. S.’ The trustees having refused to accept on presentment, the document was protested as a bill for non-acceptance and for non-payment, and there the matter rested, until the claim founded on the document was lodged in process in March 1859.

The Lord Ordinary and the Court held that this document constituted a sufficient assignation, and was completed by judicial intimation prior to sequestration.

The Lord Justice-Clerk observed that nothing was better settled than this, that no special form or words of direct conveyance were necessary for the assignation of moveables. Assignation was an authority in writing to pay over or deliver a moveable fund or subject, which, when charged, would transfer the fund or subjects to the party in whose favour the order was granted. The document, in the form of a bill of exchange; whether a good bill or no, was a good *precept* or order on the trustees to pay. It was a subsisting order on them to pay the money at the date of the multiplepoinding being raised, and it was duly intimated by the payee lodging his claim.

APPEAL IN THE HOUSE OF LORDS.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH v. THE SECRETARY FOR WAR.—March 4.

This was an appeal from the Court of Session in Scotland in certain actions originally raised at the instance of the principal officers of her Majesty's Ordnance. The point involved was the right to a strip of land lying at the foot of the Castle Hill, Edinburgh, called the Castle Banks, which is claimed by the War Department on behalf of the Crown. The civic authorities of Edinburgh contended that the land in question belonged to the city, under a charter of 1603, granted to them by King James VI., called the Golden Charter. The Court below decided two questions raised before them in favour of the Crown—first, whether the Castle

Banks belonged to the Crown or to the town; and whether, if these banks belonged to the Crown, the line of boundary claimed by the Crown was the true boundary between the property of the Crown and the town. The present appeal was then brought.

Their Lordships, agreeing in opinion with the Court below, affirmed their decision, and dismissed the appeal.

English Cases.

EMBEZZLEMENT.—The prisoner, the cashier and collector of a manufacturing firm, had, in addition to a fixed yearly salary, a per-centage on the profits made by the firm, but was not to be liable for its losses; and he had no control over the management of the business. It was held, he might be indicted as a servant for embezzling the monies of the firm. Pollock, C. B.: It was contended at the trial, that, as the prisoner had a per-centage on the profits, he was a partner with the prosecutors, and not liable to be convicted of embezzlement. That point is reserved for inquiry. Even if the language used may be sufficient to show that he was a partner with the prosecutor, as to third parties he clearly was not a partner *inter se*, so as to enable him, who was the servant, to help himself to his masters' money.—(*R. v. Macdonald*, 31 L. J., Ma. C. 67.)

ALIMONY.—In the absence of proof that the husband's income has altered, permanent alimony will be awarded upon the income upon which alimony *pendente lite* was allotted, and neither party will be allowed to dispute the correctness of the estimate then taken. *Quære*,—Whether, upon the application for permanent alimony, a party can show that there has been such alteration in the husband's income, unless he has previously filed a pleading setting forth the facts on which he relies.—(*Franks v. Franks*, 31 L. J., Pr. and M. 25.)

COLLUSION.—In order to establish a charge of collusion against the petitioner and the respondent in a suit for dissolution of marriage, it is necessary to prove that there was some understanding or agreement between them; and therefore, where a husband and wife, both of them being anxious to obtain a divorce, presented cross-petitions, and the husband's petition was dismissed upon his own application, and he abstained from making any defence to his wife's petition, the judge-ordinary directed the jury, that, if that course had not been taken in consequence of any understanding or agreement between the parties, but each had acted independently of the other, the petitioner was not guilty of collusion.—(*Gethin v. Gethin*, 31 L. J., Pr. and M. 43.)

CONDITIONAL WILL.—Where a testator made a will in case of a contingency, 'should anything happen to me on my passage to Wales, or during my stay,' and returned to his home safely, the Court held that the will was conditional, and, the contingency not having occurred, that it was ineffectual. The Court will hold a paper to be testamentary which is in due form and duly executed, without looking at its contents, even though they are manifestly nugatory. To constitute an adherence, since the Wills Act, it must be accompanied by all the formalities required to the due execution of a will. Sir C. Cresswell thought the writing was testamentary, but conditional. There was evidence of adherence; but it was contended that such evidence could not, since the statute of 1 Vict., c. 26, establish the will. All the cases cited were before the statute of Victoria. In principle, it is like the case of a will made by a married woman without the consent of her husband, which, before the statute, might be established by a parol recognition after the husband's death, but no such operation could be given to it now.—(*Roberts v. Roberts*, 31 L. J., Pr. and M. 46.)

PATENT—Specification Claimed.—‘The construction of reaping machines according to the improvements before described, that is to say, the constructing and placing of holding-fingers, cutting-blades, and gathering-reels respectively, as before described, and the embodiment of those parts as so constructed and placed, all or any of them, in machines for reaping purposes, whether such machines are constructed in other respects as before described, or however else the same may in other respects be constructed.’ The published description of a previous patent machine stated it to be ‘for improvements in that kind of machine in which the grain is cut by the serrated edge of a straight and vibrating cutter, operated by a crank, the grain sustained by fingers. The blade is serrated like a sickle, except that the angle of the teeth is reversed for every alternate tooth. . . . The fingers for supporting the grain are spear-formed.’ *Held* by the Court of Ex. (Bramwell, B., *diss.*), that in an action for the infringement of the subsequent patent, the defendant was, by reason of this prior publication, entitled to a verdict on the plea that the invention was not new.—(*M’Cormack v. Gray*, 31 L. J., Ex. 42.)

SALVAGE.—The screw steamship *E. H.*, on her voyage from Cronstadt to London, sustained damage to her screw, when she was fallen in with by the *City of Hamburg*, who proffered her assistance and took her in tow; but after having towed her some distance, the rope parted, and the *E. H.* drifted away and was lost sight of. *Held* that no salvage was due, because the efforts to save had not been attended with success. Dr Lushington: The principle we always act upon is, that the service must be successful. At the same time, it is not necessary, in order to constitute a salvage service, that the ship salvaged should be brought into port, as, for example, in the case where a ship is fast in the sand, and another ship tows her off and leaves her; for she is brought into a state of safety by being towed off the bank.—(*The Edward Hawkins*, 31 L. J., Pr. M. and A. 46.)

CONTRACT.—Plaintiff having sold corn by sample, to be delivered to the purchaser at his mill at B., sent the corn by the defendants, railway carriers, paying the freight to B. station, and an extra sum for cartage to the mill. In pursuance of general orders previously given by the consignee to the defendants, but not communicated to the plaintiff, the defendants left the wheat at their station at B., and advised the consignee of its arrival, who examined it, but left it there for two months, and afterwards refused to take it. The wheat was deteriorated in quality during that time. *Held*, that the defendants were not liable to an action by the plaintiff for not delivering at the mill, since the non-delivery there was pursuant to the orders of the consignee; and that it made no difference in this respect that the plaintiff could not recover the price of the wheat from the purchaser, in consequence of there being no acceptance of the wheat within the meaning of the statute of frauds.—(*London & N.-W. Ry. Co. v. Bartlett*, 31 L. J., Ex. 92.)

MASTER AND SERVANT.—When a stranger invited by a servant to assist him in his work, was, while engaged in giving such assistance, injured by the negligence of another servant of the same master in the course of his employment,—*Held*, that the stranger could not hold the master responsible. The stranger, by volunteering his assistance, could not impose upon the master a greater liability than that in which he stood towards his own servant; and therefore, if the master take care that his servants are persons of competent skill and carefulness, he is not liable for any injury that one may receive through the negligence of another.—(*Potter v. Faulkner*, 31 L. J., Q. B. (Ex. Ch.) 30.)

CONTEMPT OF COURT.—The use of threatening expressions to a person cognizant of facts in issue in a suit, with the intention of intimidating him and preventing him from giving evidence at the hearing, is a contempt of Court.—(*Shaw v. Shaw*, 31 L. J., Pr. and M. 35.)

GUARANTIE.—A guarantie in the following form—‘Gentlemen,—As Mr D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account,’—is not on its face a guarantie in respect of a past supply, but is to be read as for goods to be supplied. Pollock, C. B. : The guarantee either is ambiguous, in which case parol evidence may be given ; or it is to be read, as I think it should be read, namely, as a guarantee for goods to be supplied. Looking to this document as a mercantile instrument, I entertain no doubt that it was given for the purpose of obtaining a supply of goods, and not for the purpose of requiring a guarantee for a past supply, which would be merely a guarantee for an existing debt.—(*Hoad v. Grace*, 31 L. J., Ex. 98.)

EASEMENT.—To an action for obstructing the light and air from entering plaintiff’s dwelling-house ; for raising buildings above the level of the said house, and thereby preventing the smoke from being carried off from it by the chimneys of such house ; and for pulling down certain adjoining buildings of defendant, by which plaintiff’s house was deprived of the support to which it was entitled, defendant pleaded for a defence upon equitable grounds, that the grievances complained of were occasioned by defendant pulling down a messuage of his and erecting another messuage in lieu of it, and that defendant so pulled down the one messuage and erected the other, and expended thereby large sums of money, with the knowledge, acquiescence, and consent of plaintiff, and on the faith that plaintiff so knew of, and acquiesced in, and consented to defendant so pulling down the one messuage and erecting the other, and so spending such sums of money. Defendant being under terms not to rely on such plea as amounting to a common law plea of leave and license, plaintiff replied thereto, upon equitable grounds, that the plaintiff acquiesced and consented as in that plea mentioned upon the faith of false representations made to him by defendant, viz., that the grievances complained of would not result from the pulling down of the one and erecting the other messuage, and expending of the money as in the plea mentioned. It was held that the plea was good as an equitable defence, but that the same was well answered by the replication.—(*Davies v. Marshall*, C. P., 31 L. J., C. P. 31.)

COLLUSION.—If a husband, whose wife is leading a life of prostitution, pay money, or cause money to be paid, to a person to commit an act of adultery with her, in order that he may obtain evidence to enable him to institute a suit for a dissolution of his marriage, the Court will not grant a decree in consequence of the act of adultery so committed with his concurrence. But where A., a friend of the petitioner, offered B. L.5, if he would obtain evidence against a respondent, and B. made an arrangement with the co-respondent that he should commit adultery with the respondent and receive half the money, and the adultery was accordingly committed, and the money paid by A. and divided between B. and the co-respondent, the Judge Ordinary directed the jury that if the arrangement between B. and the co-respondent was made without the knowledge and concurrence of the petitioner, the petitioner would be entitled to a decree by reason of the adultery committed in pursuance of the arrangement.—(*Sugg v. Sugg*, 31 L. J., B. and M. 41.)

TRUST AND TRUSTEE.—By a will, appointing three persons, A., B., and C., trustees, it was provided that each trustee should be answerable only for losses arising from his own defaults, and not for the acts or defaults of his co-trustees or co-trustee ; and, particularly, that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any money for the purposes of the will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same monies. In September 1857 the three trustees signed a receipt for a portion of the trust-fund, and in November 1857 they signed a receipt for the residue thereof. On each occasion B. and C. concurred in allowing A. to receive the amounts

then paid, in order that he might deposit the same at interest in the joint names of the trustees in some joint-stock bank, until an eligible investment for the fund could be found. In 1859 B. and C. discovered that A. never made any such deposit, but that he applied the trust-fund, as soon as he received it, to his own purposes. Upon a bill by the *cestuis que trust*, for the purpose of making B. and C. liable for A.'s misappropriation, it was held, affirming the decision of one of the Vice-Chancellors, that, according to the construction of the indemnity clause, the act and concurrence of B. and C., in enabling A. to receive and deal with the fund, did not render them liable for his misappropriation of it. Lord Westbury, Ch. : By the terms of the clause, the trustee was exempted from obligation—first, when he received the money and handed it over to another trustee without further concern ; secondly, when he permitted his co-trustee to receive the money, and made no inquiry as to its application ; thirdly, when he became aware of a misapplication by his co-trustee, and wilfully abstained from noticing it. These three grounds of liability were well known, and they were met by words forcible enough to prevent their operation.—(*Wilkins v. Hogg*, 31 L. J., Ch. Ca. 41.)

SURVIVANCE.—Husband and wife having died by the same calamity (a railway accident), administration of their personal estate was granted to their respective next of kin. Sir C. Cresswell : The principle on which the Court have acted in several cases where the death of husband and wife have taken place about the same time, has been, that where there is no evidence of the one having survived the other, the next of kin of each is entitled to a grant of administration.

RAILWAY STATUTES.—The act authorizing the construction of the defendants' railway declared that nothing therein contained should prevent the owners, lessees, or occupiers of lands near the company's railway, from making railways, roads, etc., across the company's railway, and to use such railway, roads, etc., for the benefit of themselves and others to whom they might give leave, and in such way, and for such purposes as they might require ; and the company should not be entitled to demand tonnage or compensation for the making of such railway or the passing of goods, persons, horses, carts, etc., along such railway. Vice-Chancellor Kindersley, agreeing in opinion with Mr Baron Channell, decided (contrary to the opinion of Mr Justice Willes) that the plaintiff, who was the owner of adjoining lands, was not entitled to use any railway made by him over the defendants' line for the purpose of carrying passengers and goods as a public carrier, charging fares or tolls for the same ; but only for purposes connected with the more beneficial use of his own lands or those of others whom he might authorize. But it was held upon appeal (the Lords Justices agreeing in the opinion of Mr Justice Willes), that plaintiff was entitled to use his line of railway as a common railway carrier, taking tolls, and the restrictive words of the Vice-Chancellor's order were directed to be struck out. Turner, L. J. : The section which we have to consider, provides that no injury is to be done to the railway, and that the free passage over, along, and upon it, is not to be prevented. To the extent to which the public interest is concerned, that interest is thus secured ; and we cannot, I think, impute to the Legislature, in an act of this nature, an intention which is not expressed in the Act, to prefer the private interests of the landowners, in respect of the profits to be derived from their lands.—(*Hughes v. The Chester and Holyhead Rail. Co.*, 31 L. J., Ch. Ca. 97.)

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BIOGRAPHICAL SKETCHES OF THE COLLEGE OF JUSTICE.

No. VI.

HAVING in our last chapter given a short account of the life and character of Lord Stair, we now proceed to notice some of the other Senators who were appointed between the Restoration and the Revolution.

Sir Robert Nairn of Strathend was one of the Committee of Estates who were taken prisoners at Alyth, in August 1651. He was sent to the Tower, and remained there in captivity till the Restoration of Charles II. The restored Prince immediately, in January 1661, appointed him one of the Ordinary Lords of Session; and, twenty years afterwards, in January 1681, as a further recompense for his services and sufferings, he was created a peer, under the title of Lord Nairn. It would appear that doubts were entertained whether Nairn's elevation to the peerage would not interfere with his continuing to occupy a seat on the bench. To remove these the King addressed a letter to the Court, intimating his resolution that it should not do so. In our day, a difficulty of the kind would hardly be held as falling to be dealt with by the king or Government. But, in the times of the Stuarts, the limits of the power of the Executive were not so well defined as they are now. Nairn's name would probably be unknown to history, were it not for the disgraceful part he took, or rather, which was taken for him, as a Lord of Justiciary, at the trial of Argyll. For a good while before the trial, Nairn had been so old and infirm that he was unable to take his turn of the Outer House with the other judges; but his devotion to the Court was too well known

to allow of his being permitted to be absent on so critical an occasion as the trial of the great Whig nobleman. He took his seat accordingly, and listened for a time to the debates on the relevancy of the indictment. As the debate went on, he became so fatigued, that his loyalty could bear him up no longer, and he retired to bed. This did not, however, lead to an adjournment, but the debate was allowed to go on to its conclusion. When the Court proceeded to vote, it was found to be equally divided—Collinton and Kirkhouse being against the relevancy, while Newton and Forret were in favour of it. Lord Queensberry, who presided as Justice-General, was unwilling to vote; and ‘therefore,’ says Wodrow (ii. 211), ‘about the middle of the night, the old infirm gentleman, the Lord Nairn, behoved to be wakened out of his sleep, raised out of bed, and brought into the Court, that numbers might supply the want of law and reason. It was in vain to urge that he had not been present at much of the debate—his vote was now necessary; and, to supply that, when he came in, the clerk was ordered to read over the reasonings; and when this was a-doing, his Lordship fell asleep among their hands. However, he knew how to vote, and his vote with the other two carried the relevancy.’ It is needless to make any remark on the disgrace attaching to all the actors in this judicial farce. They might just as well have proceeded at once, without enacting it, to the tragedy which followed. Nairn dragged on existence till 1683, when he fell into the long sleep.

Robert Burnet of Crimond, a son of Burnet of Leys, studied law in France, and was admitted advocate in 1642. He was a keen opponent of the Presbyterian party. Nevertheless, he married Rachel Johnston, the sister of Sir Archibald Johnston of Warriston, a lady zealously devoted, like her brother, to the cause of the Covenant. Their well-known son, Bishop Burnet, the counsellor of William and Mary, and historian of his own times, did not inherit the straightforward character of either parent; and, like most men who try to keep well with all parties, he secured very little respect from any. But this is anticipating. Burnet’s opinions were so well known, that even his near relationship to Warriston could not save him from several years’ exile during the Commonwealth. One of his letters to his brother-in-law written at this time, and preserved by Hailes (*Memorials*, ii. 74), shows him to have been a man of accomplished mind, with a nature at once brave and tolerant. War-

riston had been inquiring about Sydeserf, the Bishop of Galloway, then in exile along with Burnet, who thus replies :—‘ All Scots and English here, both of one party and another, respect him ; and I assure you he defends the Protestant religion stoutly against Papists ; and none of our Scots Papists dare meddle with him, after they had once essayed him. Be not too violent, then, and do as you would be done to, for you know not how the world will turn yet. I shall not seek greater punishment of my greatest enemies, than to live as miserable a life as he says he has lived, and I know I have lived, since this business began ; and when they have essayed our life as long as we have done, I am not afraid but they be a little tamed, and better conditioned, and not so cruel-hearted. It is a wanton life to make good fare upon other men’s purses, and lye in their wives’ bosom all night, and then urge other men that may be as good and acceptable to God as themselves, to be persecuted. *Aliquid dandum humanitati saltem charitati Christianæ*, for me *Non ignarus mali miseris succurrere disco*. And if you should never be so violent to us, yea, if you should bray us in a mortar, that will not make us, against our conscience, to be of your mind.’ Ultimately he was allowed to return to Scotland, and Cromwell even offered to make him a judge. But this he declined. His son (Burnet, i. 137) says, that ‘ when he who brought the message was running out into Cromwell’s commendation, my father told a story of a pilgrim in Popery, who came to a church where one Saint Kilmaclotius was in great reverence : so the pilgrim was bid pray to him ; but he answered, he knew nothing of him, for he was not in his breviary. But when he was told how great a saint he was, he prayed this collect : *O sancte Kilmacloti, tu nobis hactenus es incognitus, hoc solum a te rogo, ut si bona tua nobis non prosint, saltem mala ne noceant*.’ At the Restoration, Burnet was made a Senator of the College of Justice, as Lord Crimond ; but he only survived his appointment a very few months, dying in August 1661. Burnet is represented as a man of ability, and of much learning, but of a very modest and gentle disposition. One would like to know how a man of such a disposition, and, at the same time, with a decided leaning to Episcopacy and the Stuarts, got on with a strong-minded covenanting lady like his wife, of whom Hailes (Memorials, ii. 75) tells the following anecdote :—‘ While her son, Bishop Burnet, was minister at Salton, he was seized with a violent fever, and during the delirium attending his distemper imagined that he was to entertain Sharpe,

Archbishop of St Andrews. "Where shall we find a place for the Archbishop?" cried he. The old lady, forgetful of her son's condition, answered, "Do not let that disturb you, my dear; we will find a place for him—in the hottest corner of hell." Perhaps the worthy Episcopalian's residence in the Low Countries was not an altogether involuntary exile.

Sir James Dundas of Arniston, after taking an active part in political life, was appointed an Ordinary Lord in 1662. He did not long, however, retain his seat on the bench; for in the ensuing year, an Act having been passed requiring all official persons to subscribe a declaration to the effect that they held it unlawful to take up arms against the King, and abjuring the Solemn League and Covenant, Dundas at once resigned his place, because he could not conscientiously subscribe the declaration. Having, nevertheless, been called upon by the Court to subscribe, he returned them the following admirable letter:—"May it please your Lordship, I did, some weeks ago, send a demission of my place in the Session to the Court, which, I hope, is before this time presented to the King's Most Sacred Majestie, whereby I am altogether incapacitated to give obedience to the Lords of Session, and their commands laid upon me as one of their number, by their letter of the fyft of this instant, signed by your Lordship in their name. This, I hope, will excuse me for not waiting upon their Lordships on Fryday next, according to their appointment, and shall entreat their Lordships may believe that though I shall no more be able to serve them as a public minister, yet I shall never omit any thing that shall be in my power as a private man, whereby I may witness the deep sense I have of their Lordships' civilitie and kindness to me while I had the honour to sit among them, which can never be forgotten by,' etc. On receipt of this letter, Arniston's place was declared vacant; but it was not filled up for eighteen months, during which he was frequently solicited to subscribe the declaration. Ignorant of the man with whom they had to deal, the Government proposed, that 'although, for the sake of example, he should subscribe *simply*, he should be allowed, in a private conversation with the King, to explain the sense in which he took the oath' (Haig and Brunton, 381). He indignantly refused to accept the proposal, saying, 'I have repeatedly told you, that in this affair I have acted from conscience. I will never subscribe that declaration, unless I am allowed to qualify it;

and if my *subscription* is to be *public*, I cannot be satisfied that the *salvo* should be *latent*.' Arniston lived till 1679. His son, Sir Robert, was made an Ordinary Lord in 1689, and his grandson and great-grandson successively became Lord President of the Court, in 1748 and 1760. A good name is a splendid inheritance.

Sir John Nisbet of Dirleton was admitted advocate in 1633, and soon gained a considerable reputation for the part he took in conducting the defence of Lord Balmerino. About 1640 he was appointed one of the Commissaries of Edinburgh, an office which he long held. In 1663 he bought Dirleton, of which Lamont says (*Diary*, 167), 'it stood him a great sowme of money, and was looked on as a great bargaine and purchase at that time.' In 1664 he was appointed Lord Advocate and an Ordinary Lord of Session, being the last person who held both these offices at the same time. Nisbet was a vehement supporter of the royal policy, and, as might be expected, drew down upon himself the displeasure of the Presbyterians. 'About this time,' writes Kirkton (*Church of Scotland*, p. 218), 'Sir John Nisbet was made Advocate in place of Fletcher, a man of far more dangerous temper, for money might sometimes have hired Fletcher to spare blood; but Nisbet was always so sore afraid of losing his own great estate, he could never, in his own opinion, be officious enough to serve his cruel masters.' Wodrow (i. 293) tells a story of Nisbet's having entrapped a Presbyterian woman, of the name of Mrs Gray, into giving evidence against her friends by sending her husband's ring to her, which he took off his finger by stratagem. We would hope the story is not true, but it is too much of a piece with the ministerial policy of the times. Devoted to the Court as he was, Nisbet, in 1669, offered a strenuous opposition to Charles' design to establish a standing militia. It was probably this fact in his history which led Burnet (i. 484) to observe that 'he was a person of great integrity, only he loved money too much; but he always stood firm to the law.' In 1677, Nisbet, having offended Lord Hatton, Lauderdale's brother, was obliged to resign his office, being succeeded as Lord Advocate by Sir George Mackenzie. He died in 1687. Nisbet was a man of great learning, both in law and literature. Forbes, in his preface to the *Journal of the Session*, p. xli., says he long acted as commissary, 'which led him to make uncommon researches into the consistorial law, of the fruits whereof perhaps the burning of his house deprived the learned

world, where he lost a curious Greek manuscript, written with his own hand, for recovery whereof he offered L.1000 sterling to any person that would restore it.' Sir George Mackenzie's comparison of him with Sir John Gilmour is too well known to require repetition here. That, however, which makes Lord Dirleton's name most familiar to us, is his being the author of the well-known 'Doubts.' These consist, for the most part, of unsolved questions of law, which Dirleton collected while he was Lord Advocate, and which were reduced to order by Sir William Hamilton of Whitelaw, and published in 1698, along with his 'Decisions.' Dirleton's 'Doubts,' it is needless to say, were 'resolved and answered by Sir James Stewart of Goodtrees,' Lord Advocate in the reigns of William and Mary and Anne. Lord Advocates of those times were either less busy or more industrious than those of the present day.

Sir Peter Wedderburn of Gosford was admitted advocate in 1642, and promoted to the bench in 1668. Sir George Mackenzie says of him : '*Wedderburnus morum probitate judices clienti conciliabat, dicendique suavitate eos corrumpere potuisset, si voluisset ; nihil autem ille in facto, nisi quod verum, nec in jure, nisi quod justum, pathetice urgebat.*' Gosford is well known as a collector of decisions from 1668 to 1677. He was very highly respected by his brethren on the bench ; and accordingly, in 1679, Fountainhall relates (i. 48) that, 'President Stair being at London, the Lords, according to their custom, and the warrant given them by the 93d Act, Parl. 1579, elected Lord Gosford Vice-President. Some thought that Collington or Strathurd, as the eldest Senators, might preside, conform to the 93d Act, Parl. 1540 ; others, that the King might name one to supply the President's place in his absence, as was done in the 42d Act, Parl. 1537.' Gosford died in November 1679.

Charles Maitland of Hatton was a son of the first Earl, a brother of the famous Duke of Lauderdale, and ultimately succeeded to the earldom himself. At the Restoration he was created Master and General of the Mint,—a department which had been in abeyance during the Commonwealth, so much so, that the new Master had to get authority from the Estates 'to search for and inquire after wher he can find any of the tools or work-loomes belonging to the Conzie-house.' In 1670 he was appointed an Ordinary Lord of Session, and in the following year Treasurer-Depute of Scotland. At this

time, his brother, the Duke of Lauderdale, governed Scotland as Lord High Commissioner; and Hatton acted as his deputy, or, as Wodrow (i. 345) calls him, his 'great doer,' during his frequent attendance at the English Court. The mode in which he administered affairs was such as to have excited against him popular hatred even greater than that which was entertained against his brother. The tyranny he exercised over the people, and the insolence he used towards the nobility, united all classes in a feeling of bitter hostility to him. This showed itself frequently, even whilst Lauderdale retained his power; but the Duke's downfall was the signal for its fiercest manifestation. In 1681 he was accused in Parliament of having perjured himself at the trial of Mitchell for shooting at Archbishop Sharpe. Hatton had been one of those to whom Mitchell had made a confession, on a promise being made by them, on the part of Lauderdale, that his life would be saved (Burnet, ii. 126). But when examined at the trial, he denied that any such promise had been given, although Lord Kincardine had letters under his hand in his possession, 'in which the matter was truly related, that upon promise of life he had confessed the fact' (Burnet, ii. 130). The accusation, which must have ended in a conviction, was not finally disposed of, in consequence of the timely adjournment of Parliament. Fountainhall (i. 150) says, in regard to it, 'But it had the effect of Machiavel's advice, *Calumniare audacter, aliquid semper adhærebit*. Some made a mock allusion to the old history *de Hattone quodam A. Episcopo Moguntino perjuro*, who, by a false oath, beguiled Albert, Earl of Bamberus, and betrayed him to the Emperor Lewis the Fourth. The ridiculous allusion lies in the vicinity of the name.' Another leading charge against Hatton was, that, as Master of the Mint, he had tampered with the coinage, and had issued much light, and even base money, on a design to enrich himself. In 1682, a Royal Commission was appointed to inquire into this charge. The Commissioners, it must be admitted, were nearly all bitter opponents of the accused, and they cannot be said to have given him a fair trial. Their report was so strongly against him, that he was deprived of all his offices, and the Lord Advocate was directed to prosecute him for malversation. The result of the prosecution was, that the Court ordained him to pay a very large sum to the King, who compromised the matter, on condition of Hatton's paying L.20,000 to the Lord Chancellor Aberdeen and Graham of Claverhouse. The constabulary of Dundee

was part of the spoil which fell to the latter, who took his title from it afterwards. Lauderdale dying in 1683, Hatton succeeded to the peerage, and in 1686 he was re-appointed a Privy Councillor by James II., whose purposes he had often served. He died in 1691, leaving behind him a very indifferent reputation.

Sir Andrew Ramsay of Abbotshall was originally a merchant in Edinburgh, of which city he was elected Provost in 1654. Lauderdale about that time obtained from the King a charter, erecting Leith into a burgh of regality, under the name of Charlestown. This he used as a means of extracting money from the corporation of Edinburgh; for, says Mackenzie (Memoirs, p. 25), 'he boasted to settle a trade in Leith that would break theirs.' Ramsay induced his colleagues in the Town Council to give Lauderdale L.5000 (Maitland, History of Edinburgh, p. 98, says L.6000) for his rights under the charter. Lauderdale, on the other hand, 'in requital of that favour, obtained L.200 sterling per annum, settled upon the Provost of Edinburgh; and caused the King give him L.4000 sterling for his comprising of the Bass, a rock barren and useless. [Thus, they were kind to one another upon his Majesty's expences.]' (Mackenzie's Memoirs, p. 25.) Sir Andrew was re-elected Provost in 1662; and, with the assistance of Lauderdale, and the use of the most unscrupulous means, maintained himself in that position until 1673. As Provost of Edinburgh, he presided in the Convention of Royal Burghs, then a body of considerably more authority than at present. He was also Commissioner for the city in Parliament; and, in virtue of all these offices, he possessed much influence, which he used so thoroughly to the satisfaction of Lauderdale, that the latter made him a Privy Councillor, and in 1671 appointed him a Senator of the College of Justice. In regard to this last appointment Mackenzie says (Memoirs, p. 240), 'Lauderdale, by promoting four (*ignorant persons*), who had not been bred as lawyers, without interruption, and in two years time, to be judges in it, viz., Hatton, Sir Andrew Ramsay, Mr Robert Prestoun, and Pittrichie, rendered thereby the Session the object of all men's contempt. And the advocates being disobliged by the regulations, did endeavour, as far as in them lay, to discover to the people the errors of those who had (*opprest*) oppos'd them; and they being now become numerous, and most of them being idle, though men of excellent parts, wanting rather clients than wit and learning, that society became the only

distributors of fame, and, in effect, the fittest instruments for all alterations. For such as were eminent did, by their authority, and such as were idle, by well-contriv'd and witty raillery, make what impressions they pleas'd upon the people.' We should like to see some of these ancient squibs ; but, doubtless, they became the prey of the buttermilk and the trunk-maker well nigh two centuries ago. The Government of the present day should be very careful in the judicial appointments they make ; for there is an immense amount, certainly of idleness, and presumably of wit, in the Parliament House at this writing. Unfitness for the judicial office to which he had been appointed was not, however, the only ground of complaint against Ramsay. He had, within his own sphere, acted fully up to the tyrannical example of his patron Lauderdale, and had never scrupled as to the means to be employed in clearing out of his path those who would have obstructed him in it, however reputable they might be. The opponents of Lauderdale thought, too, that they might deal a severe blow at the Commissioner, if they could deprive him of the Provost's influence in the Parliament and the Convention. Mackenzie's account of the measures they adopted is so interesting, that we give it entire (Memoirs, pp. 260-2) : 'The party finding that Sir Andrew Ramsay, then Provost of Edinburgh, did much influence the burghs by his own and his colleagues' leading vote, and by the eminent interest that the good town of Edinburgh has always amongst the burghs, which Sir Andrew had much improv'd by his being long continued and highly therein supported, they therefore resolv'd to declare him incapable ; and in order thereto, an impeachment was given in against him, being presented by the Earl of Eglintoun. But it was contended "that it behov'd to be sign'd by some accuser, else it could not be receiv'd ; and if any such custom were receiv'd, any man's reputation might easily be blasted, to prevent which our law had, in imitation of the civil law, appointed that the accuser should find surety to insist under a liquid penalty." To which it was answer'd, "that though private accusers were obliged to sign their accusations, yet it was lawful for the Parliament to accuse any man, in which pursuits, at the people's instance, no surety could be found : And it was fit that, since some men were so powerful that no private men durst undertake them, therefore the Parliament should insist against them, by which means great men might be deterr'd from oppression, and public justice

might be the easilier satisfied." Upon the debate, his Majesty's Advocate was desir'd to give his name to the pursuit, it being alleg'd that he was thereto oblig'd *ratione officii*, as being in law *calumniator publicus* ; but this he declin'd, contending most justly that he was not the Parliament's, but the King's servant, and therefore he would pursue no man without express warrant from the King or his Commissioner ; nor knew he the Parliament to have any authority, except with the King's concurrence, for they were only his great Council. This forc'd Sir Andrew's enemies to prevail with some of the citizens of Edinburgh to sign an accusation against him, bearing that, "albeit by the Act against billeting, it was declared a crime in any man to endeavour to thrust any of his Majesty's subjects out of their employment, without a formal and legal sentence ; yet he, the said Sir Andrew, had procured a letter from his Majesty to thrust Mr James Rocheid out of his employment as town-clerk of Edinburgh ; and albeit the making lies betwixt the King and his people was punishable by death, yet he had represented to his Majesty that the town had risen in a tumult against the King, and had thereupon procured another letter, commanding the Privy Council to proceed against the chief citizens as malefactors." The blow was so well directed—for Lauderdale had obtained for Sir Andrew the letters mentioned in the impeachment—that the only mode of escape for both was, that the latter should resign his offices, which accordingly he did in November 1673. When James II. succeeded to the throne, he would appear to have remembered Sir Andrew's services, for he made him a Commissioner for trade,—a post for which he was certainly much better fitted than for a seat on the bench. He died in 1688.

Sir Thomas Murray of Glendoick was appointed an Ordinary Lord in May 1674, along with Sir David Balfour of Forret. Some recent appointments of Lauderdale's having, as we have just seen, diminished the reputation of the Court, their Lordships determined to take steps to raise it again. The following is Dirleton's account of the matter (Decisions, pp. 71-2) :—'The King's Majesty having, by two letters to the Lords of Session, presented Mr David Balfour of Forret, and Mr Thomas Murray, both advocates, to be Lords of Session, it was moved by one of the Lords, that seeing, by the law and Acts of Parliament, those who are to be admitted to be Lords of Session should be tried, therefore the trial should be such as is

intended by the law,—the very notion of trial importing, at least, a serious if not a strict and exact way of trial. This was moved, because that way of trial had become of late so perfunctorious, and *dicis causa*, that it was ridiculous, and, in effect, a mock trial,—some of the Lords being appointed to examine those who were named by the King; and after they had asked some trivial questions, having made report that they found them qualified, albeit it was not only known to the examiners, but to all the Lords, and notour to the world, that they were altogether ignorant both of law and practice, and did acknowledge it themselves, not daring to expose themselves to sit in the Outer House as Ordinaries, they prevailing with others of the Lords to go out and officiate for them as curates.' After discussion, it was resolved to adhere to the old mode of private trial, so far as Murray and Balfour were concerned; and after undergoing it, they were admitted on 4th June 1674. The deliberations of the Court were, however, in the following month, embodied, under royal authority, in the Act of Sederunt, which still, with scarcely any alteration, regulates the admission of judges into our Supreme Civil Court. Murray was related to Lauderdale's wife, and through her influence he was appointed Clerk Register in 1677. In 1681 he obtained the patent for publishing his well-known edition of the Scots Acts. When Lauderdale fell, he lost all his offices.

Sir Alexander Seton of Pitmedden was admitted advocate in 1661, and appointed an Ordinary Lord in 1677. He sat in Parliament as Commissioner for the county of Aberdeen, from 1681 to 1686. Both on the bench and in Parliament he conducted himself with the greatest independence, and offered the boldest opposition to the policy of James II., as well before as after he succeeded to the throne. Pitmedden's resistance to the repeal of the Test Laws gave such offence to the King, that his Majesty addressed a letter to the Court, intimating that, 'for reasons known to our self, we have thought fit to remove Sir Alexander Seton of Pitmedden from being one of the Senators of the College of Justice.' In alluding to his treatment at the King's hand's, Pitmedden, in his Notes (MS.) on the Books of Sederunt, says, 'St Basil being invited by Modestus, by command of Valens the Emperor, to turn Arian, with a promise of rewards, and threatened with punishments if he returned not, answered, "Rewards were fit to tempt children, and threats to terrify cowards."' A curious illustration of his uncom-

promising character was furnished some years afterwards, when, being offered a seat on the bench by William's Government, he refused to accept it, because he had at one time taken the oath of allegiance to James II. He latterly lived entirely among his books, of which he had a large and valuable collection, in many departments of literature. He published, along with an edition of Sir George Mackenzie's *Criminal Law*, a treatise which he composed on 'Mutilation and Demembration.' Hailes says (*Notes on the Catalogue of Senators*, p. 26), 'This treatise shows that the author had *read* many books.' Pitmedden died in 1719.

Sir Roger Hog of Harcarse was admitted advocate in 1661, and promoted to the bench in 1677. In 1688 a case came before the Court, in reference to the right of tutory over the young Marquis of Montrose. The King was very anxious to have the tutory set aside, 'on a design,' says Fountainhall (i. 495), 'to get the young Marquis to breed Popish.' Sir Roger and Lord Edmonston voted for the subsistence of the tutory, which so incensed James, that he directed both of them to be removed from their offices, which was accordingly done. It does not appear why they were not reappointed at the Revolution. Harcarse collected the decisions of the Court for several years. He died in 1700.

Sir George Gordon of Haddo was the second son of Sir John Gordon of Haddo, who was executed at Edinburgh in 1644, for his devotion to the Stuart cause. Having studied at the Marischal College of Aberdeen, he became one of the regents in that University; but after a short time resigned that situation, and devoted himself to the study of the law. In 1665 his elder brother died, and Sir George succeeded to the family estates, which had been recovered at the Restoration. 'Though he had now an opulent fortune,' says Crawford (*Officers of State*, 230), 'it did not in the least divert him from pursuing his studies, which he did with as much diligence and assiduity as if he had been to live by his profession.' In 1668 he was admitted advocate, and soon proved himself a man of learning and ability. Crawford (p. 231) says he never took any fees, 'though he had abundance of clients, and many of them persons of the first rank in the kingdom.' If this be true, it was so, not because Gordon was careless of gain, but because he flew at higher game, as we shall see. From 1670 he sat in Parlia-

ment as one of the Commissioners for the county of Aberdeen, and took an active part in the management of public affairs. His conduct pleased the Court so well, that in 1678 he was made a Privy Councillor, and in 1680 an Ordinary Lord of Session. At that time, Stair was Lord President; but in the following year, the part he took in regard to the famous Test Act, gave such offence to the Duke of York, that he was deprived of his high office. Gordon was appointed his successor, and at once applied himself to clear off the arrears, which, according to Crawford (p. 231), had accumulated during the later period of Stair's presidency. Gordon's promotion seems to have given great satisfaction to the extreme Royalist party; and Crawford quotes (p. 231-2) the exceedingly fulsome dedication of Edward's *Doxologia*, in which the author compares him to Daniel, as another of the 'children of the captivity' 'come to judgment.' So much, too, did he remain in favour with the Duke of York, that in May 1682 he procured for him the office of Lord Chancellor, vacant by the death of Rothes. Gordon was at this time in London, and was invited by the Duke to accompany him to Scotland in the 'Gloucester' frigate, which was waiting for him in the river. They accordingly embarked, but were not fated to have a prosperous voyage; for the vessel struck on a sandbank near Yarmouth, and was lost. The Duke escaped in the small boat, taking with him Gordon, and one or two others; and directing his attendants to draw their swords, and prevent any besides from crowding into it. Crawford's account (p. 231) of the escape is so curious for its courtliness, that we cannot help quoting it: 'On the 7th of May, the ship unhappily straining on the Lemon Ore, his Royal Highness, to testify the great esteem he had for the Lord Chancellor of Scotland, was graciously pleased to save him in the small barge with himself.' In November 1682, Gordon was created Earl of Aberdeen. At this time the administration of Scottish affairs was chiefly in the hands of the Duke of Queensberry, who was the Lord High Treasurer, and Lord Aberdeen became his principal colleague in the Government. The pecuniary benefits connected with this position were very considerable; and, according to Burnet (ii. 315), the Chancellor was not slow to take advantage of them. Speaking of the methods of oppression resorted to by Charles' ministers for extorting money, Burnet says, 'in these the new Chancellor exceeded all that had come before him. He had a small estate, which he resolved to raise up till it should hold a proportion

to his new title.' No doubt this statement is highly coloured, for Burnet hated Aberdeen, and all his party. But there can be as little doubt that the Chancellor added largely to his fortune by the share he obtained of the fines which were imposed on members of the weaker factions. To give but one instance : of the L.20,000 which Hatton had to pay for his malversations at the Mint, Lord Aberdeen's share was L.16,000. So matters went on for about two years, at the end of which Queensberry and his colleague became estranged very much through the intriguing of Lord Perth, who wished the office of Chancellor for himself. Burnet's account of their final difference is exceedingly graphic (ii. 414) : ' Lord Aberdeen seeing he was losing ground at Court, intended to recover himself a little with the people ; so he resolved for the future to keep to the law, and not to go beyond it. And such was the fury of that time, that this was called moderation and popularity. The churches were now all kept by the men ; but their wives not being named in the Act of Parliament, none of them went to church. The matter was laid before the Council ; and a debate arose upon it, whether man and wife, making one person in law, husbands should not be fined for their wives' offence, as well as for their own. Lord Aberdeen stood upon this, that the Act did not mention the wives : it did, indeed, make the husbands liable to a fine, if their wives went to conventicles, for they had it in their power to restrain them ; and since the law provided in the one case as to their going to church, he thought the fining them on that account could not be legally done. Lord Queensberry was for everything that would bring money into the treasury : so, since in these parts the ladies had for many years withdrawn wholly from the churches, he reckoned the setting fines on their husbands to the rigour that would make all the estates of the country be at mercy ; for the selling them outright would not have answered this demand for the offences of so many years. The Earl of Perth struck in with this, and seemed to set it up for a maxim, that the Presbyterians could not be governed but with the extremity of rigour ; and that they were irreconcilable enemies to the King and the Duke, and that, therefore, they ought to be extirpated. The ministry in Scotland being thus divided, they referred the decision of the point to the King ; and Lord Perth came up to have his resolution upon it. The King determined against the ladies, which was thought very indecent ; for, in dubious cases, the nobleness of a prince's temper should always turn him to the merciful side.

This was the less expected from the King,' the Bishop slyly adds, 'who had all his lifetime expressed as great a neglect of women's consciences as esteem for their persons.' Lord Aberdeen's concern in this dispute led to his dismissal, and Lord Perth was made Chancellor in his room. He never again held office; and, indeed, till Anne's accession, he entirely abstained from public affairs, for he declined to take the oath of allegiance to William. He died in 1720 at a very advanced age. Lord Aberdeen was a man of very great ability and very high attainments, and in better times might have borne as unsullied a name as his descendant the late Premier did. But it cannot be denied that he was tainted with the public vices of the age in which he lived,—want of scruple as to the means for acquiring power, and as little scruple in the mode of using it when acquired. He served bad masters, and was contaminated by them.

We ought now to proceed to the famous Sir George Lockhart of Carnwath, who was appointed Lord President in 1686; but this chapter is already too long, and we must defer our notice of him for the present.

NOTES ON THE LAW OF CHARITABLE ENDOWMENTS.

(Continued from page 195.)

II. *Resulting interests under Charitable Trusts and Endowments.*

THERE are three classes of persons interested in a trust,—the beneficiaries, properly so called, the trustees, and the heirs of the truster. We have hitherto been dealing almost exclusively with the first of these classes; it will be necessary, however, also to refer very shortly to the interests of the other two.

In regard to the trustees the general rule is, that where a bequest is made to them and to their successors in office, such bequest will be held to be in trust, and not beneficial to themselves, unless express words or plain implication show an opposite intention (*Black's Trustees v. Miller*, 23 Feb. 1836, 14 S. 555, and 2 S. and M'L. 866). An illustration of the exceptional circumstances in which an interest does result in favour of the trustees personally, is furnished by the case of *Burnett v. King's College of Aberdeen* (23 Feb. 1844, 6 D. 731; reversed 28 Aug. 1846, 5 Bell 409). Sir Thomas Burnett, the founder, mortified certain lands in favour of the College, and

‘provydit thrie burseris of philosophie to be educat, brocht up, and maintinet, every ane of thame for the space of four zeiris at the said Kingis Colledge of Auld Aberdeen. According to the maner, measure, and qualitie, and as the rest of the burseris of philosophie presentlie in the said Colledge alreiddie found, are educat and enteritenit.’ Sir Thomas reserved the patronage of the bursaries to himself and his successors, and declared that if the College should at any time refuse to receive his presentees, the mortified lands should return to him. At the date of the deed, 1648, the rents of the lands were not sufficient for the support and education of the three bursars, but the College supplied the deficiency out of their own funds. In course of time, however, the rents increased so as to leave a large surplus; and the question came to be, whether the College was entitled to retain this surplus for its own purposes, or was obliged to expend the whole upon the bursars. The Court of Session decided against the College. Lords Fullerton and Jeffrey, who concurred in the judgment, both said (6 D. 750 and 752), that a conveyance was not to be presumed to be a beneficial one in favour of the trustees themselves unless there was a balance left undisposed of by the trust deed; but that, if there were such balance, then any subsequent balance would go to the trustees themselves. They were of opinion, however, that the principle did not apply in the present case, seeing that, in 1648, the rents were insufficient to maintain the three bursars. The House of Lords reversed this judgment, and held, that after maintaining the bursars according to the manner, measure, and quality of the other bursars within it, the College was entitled to retain the surplus. The Lord Chancellor, Cottenham, said (5 Bell 431), the donee under a trust will get the benefit of any increase of the fund: ‘1st, If the gift be to the donee, subject to certain payment to others; 2d, If the gift be upon condition of making certain payments, subject to forfeiture upon non-performance of the condition; or, 3d, If the donee might be a loser by the insufficiency of the fund, which, indeed, is consequential upon the last.’ His Lordship held, that all these elements combined in the present case to give the increase in the fund to the trust-donee, to wit, the College. In delivering judgment Lord Cottenham was at great pains to show that there was no adverse precedent in Scotland, though, from the tone of his remarks, it is very doubtful whether, had he found one, he would have allowed it to stand in the way of his design of reconciling the principles and practice ‘in the two jurisdictions.’

In particular, he dealt with the case of the Perth Hospital (Bell's Fol. Cas. 173), and pointed out that that was not an authority against his view, because there truly there was no 'limit of the expenditure to be bestowed upon the first object of the gift.' So far as the judgment itself went, his Lordship was quite correct; but he does not appear to have remarked that in the *obiter dicta* of the judges who took part in it, this view very clearly appears, that had there been any reversion, it would not, in their opinion, have gone to the trust-donee, the hospital, but to the heir of the donor or patron. This oversight, on the part of Lord Cottenham, deprives his judgment of the full value which otherwise it would have had. We may add, that we entertain a strong opinion, that the doctrine of a resulting beneficial interest in the trust dispositive is only defensible in the following cases; namely (1) where the dispositivees are the representatives of a public institution, such as a college or a municipal corporation, and the surplus is sought to be applied not to their individual benefit, but to the general purposes of the institution, as distinguished from the special object of the bequest; (2) where the dispositivees are either relatives of the settlor or *personæ prædilectæ*, and the disposition is not expressly qualified by words of trust, but may fairly be construed (on the principles explained by Lord Cottenham) as an absolute and beneficial disposition, subject to the *burden* of the charitable bequest; and (3) where, from the antiquity of the endowment, it is impossible to ascertain the parties who, as heirs of the settlor, would be entitled to the resulting interest, preferably to the trustees.

There is a very old case, *Commissioners of Berwickshire v. Craw*, 18 June 1678, M. 1351, in which a testator left 4000 merks to build a bridge over the Blackadder; the executor built one for 1000 merks, but the Court held that he ought to have 'waired' the whole sum on the bridge; and, therefore, on a sort of *cy-près* principle, ordained him to expend the balance on another bridge. Here, apparently, though there was actually an undisposed of balance, no interest was held to result in favour of the truster's heir, the true *ratio decidendi* however, doubtless, being that the executor's conduct was a fraud upon the trust.

In *Black's Trustees v. Miller*, to which reference has been already made, Lord Brougham said (2 S. and M'L. 890): 'If a trustee dies, or refuses the trust, where it is quite clear that the intention of the

testator was that, in that event, the heir shall take the estate discharged of any trust, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee in that case; that is the very event provided for in which it was to go over, and the trust to cease.' Again, in *M'Leish's Trustees v. Gibson and Others* (25 May 1841, 3 D. 914), a testator conveyed his whole property in favour of trustees, the free annual proceeds thereof to be employed 'solely for the use of the poor of the Episcopal communion of Scotland.' The annual appropriation contemplated by the trust deed amounted to L.350, which was to be divided, according to certain rates specified with great particularity, among 140 poor people. The Court, while holding that the trust deed excluded the heir-at-law and next of kin for the time, reserved to them any eventual interest which might arise in case the purposes of the trust should at any time become wholly or partially impracticable. The judges were of opinion, that the truster's directions as to the appropriation of the annual proceeds to a certain number of persons, and at certain rates, were to be taken as demonstrative only, and not as taxative, and, therefore, that any surplus revenue might be employed in adding to the number of persons, or increasing to a reasonable extent the sums to be paid, or even in forming a reserve fund for supplying deficiencies in future years, or defraying the expenses of necessary repairs; but 'without prejudice, nevertheless, to any question which might arise by the possible emergence of any great excess of the funds beyond what can fairly be required, under the most liberal construction, for fully satisfying all the declared objects of the trust.' Lord Moncreiff, in a learned opinion, said (3 D. 926): 'Within moderate bounds there may be a discretion to increase the sums, or to reserve the surplus for repairs and future deficiencies; but if it came to an excess, as if there were no claims, or so few as to make the shares far beyond the fair object, or the reserved funds were to be beyond any fair necessity, I should have great doubt whether the heirs at law would not have an interest.'

There can be no doubt, of course, that if the settlement fails altogether, either in consequence of vagueness, or because the object is unattainable, the estate will result to the heir-at-law as intestacy, (*Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422). To this principle we may refer Lord Jerviswoode's recent decision in the case of *Duff's Trustees v. The Lord Mayor of London and Others*. The legacy was

in the following terms:—‘I bequeath to the Societies of Scripture readers in the following towns (nine towns named), the interest of my Peninsular East India Railway funds, to be *equally* annually divided amongst them.’ Claims having been lodged for four societies, the Lord Ordinary found each of them entitled only to a one-ninth share of the specific legacy, and preferred the residuary legatee for the balance. The judgment was rested on the ground, that as the money was left to these societies in equal shares, there was no room for the principle of the *jus accrescendi*. Had the wording of the bequest been different, a question of novelty would have arisen, namely, whether, in the case of a joint bequest to several parties, some of whom are *imaginary*, the real legatees can claim the shares of the imaginary legatees, for the same reason that they would be entitled to claim the shares of real legatees, whose existence had terminated before the death of the testator.

In the Morgan case,—where the subject of the bequest was a moveable fund,—a clear opinion was intimated by the law lords, to the effect, that the surplus estate, after a fair and liberal provision had been made for the objects of the charity, belonged to the truster’s next of kin (*Mag. of Dundee v. Morris*, see Lord Wensleydale’s opinion, 3 M’Q. 175, and the judgment of the House, which declared that the will was a bequest of *so much* of the personal estate as was necessary to provide an hospital for 100 boys). In this case, as there was no testamentary appointment of trustees, no doubt could arise as to *who* was entitled to the surplus. In accordance with the judgment of the House, and no opposition having been offered, the Court of Session, after providing for the building and endowment of an hospital at a cost of L.73,500 (8 Feb. 1861, 23 D. 493), preferred the next of kin to the balance of the fund in *medio*.

The fair import of the decisions would, therefore, seem to be:—

(1.) Where there is a conveyance to trustees on the condition of their making certain payments to the beneficiaries, and the proceeds of the trust estate increase beyond the amount of these payments, the surplus will go to the trustees themselves. Wherever, in fact, there is a bargain or agreement (for so Lord Cottenham put it in the case of the Burnett bursaries, 5 Bell 409) between the truster and the trustees, by which, in one event, the trustees may suffer loss; if the value of the trust estate increases, they, on the other hand, receive the benefit of the increase.

(2.) Where the truster appoints trustees, and, without entering

into any agreement with them, simply directs certain payments to be made by them, if there comes to be a considerable surplus, it will go to the heirs-at-law of the truster.

(3.) If the trust purposes become impracticable, wholly or partially, a trust will result in favour of the truster's heirs-at-law.

In England, the leading case on this subject is Lord Eldon's celebrated judgment in the *Attorney-General v. The Mayor of Bristol* (2 Jacob and Walker, 294). Mr Lewin summarizes the results of that decision, as well as those preceding and following it, with admirable clearness, thus (Lewin, 124):—'It may be noticed, that settlements to charitable purposes are an exception from the law of resulting trusts; for, upon the construction of instruments of this kind, the Court has adopted the following rules:—(1.) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularizes no objects (*Attorney-General v. Herrick*, Amb. 712), or such as do not exhaust the proceeds (*Attorney-General v. Haberdashers' Company*, 4 B. C. C. 102; S. C. 2 Ves. Jun. 1; *Attorney-General v. Minshull*, 4 Ves. 11; *Attorney-General v. Arnold*, Shower's P. C. 22; *Attorney-General v. Sparks*, Amb. 201; and see Lord Eldon's observations in *Attorney-General v. Mayor of Bristol*, J. and W. 319), the Court will not suffer the property, in the first case, or the surplus, in the second, to result to the settlor or his representatives, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied. (2.) Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds; but, in consequence of an increase in the value of the estate, an excess of income subsequently arises; the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*Inhabitants of Eltham v. Warreyn*, Duke 67; *Sutton Colefield case*, second resolution, Id. 68; *Hynshaw v. Morpeth Corporation*, Id. 69; *Thetford School case*, 8 Coke 130 b., Vol. iv., 401). (3.) But, even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriate part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law (see *Attorney-General v. Mayor of Bristol*, 2 J. and W. 308), or belong to the donee of the property, subject to the charge, if the latter

be (as in the case of a charitable corporation) itself an object of charity.'

Mr Lewin then goes on to observe, that the law was settled at a time when the doctrine of resulting trusts was imperfectly understood; and that there is little doubt, were the subject still open, the Court would in the general case hold a trust to result.

THE APPELLATE JURISDICTION IN SCOTCH APPEALS.

It is certainly a great anomaly in the administration of justice, that the decision of Scotch appeals in the House of Lords, which is the final and sovereign Court of the realm, should be given by judges not familiar or acquainted with the law of the country which they are called on to administer, and to whom the law of that country is as a sealed book. And this anomaly is only surpassed by the still greater marvel, that Scotland should have allowed this state of things to remain so long without redress or remedy.

If the nobility and landed interests in Scotland knew how intimately the security of their titles and estates depended on their having a Scotch judge always sitting in the House of Lords, along with the English Law Lords, they would not rest until this serious defect in the appellate jurisdiction was rectified. Let us give point to this remark by an illustration. The Bargany cause involved vast interests; and it was brought three times before the House of Lords. Had the judges there understood the law of Scotland, there would have been but *one* appeal. There would have been no remit back to the Court in the *first* appeal; nor would the judgment pronounced by the House of Lords in the *second* appeal have been so defective and obscure, as only to give rise to a fresh litigation; for, observe that the sole contention in the *third* appeal, was as to what was the import and meaning of the judgment of the House of Lords in the *second* appeal. This pronouncing of a judgment, which only leads to further litigation, to ascertain what that judgment meant, amounts to an utter negation of the very object for which the appellate tribunal was instituted, namely, the finality and conclusiveness of the judgment. We might single out other cases where the same defects were exhibited, *e.g.*, in the Roxburgh causes and the Queensberry cases; but we do not wish to multiply instances. The magnitude

of the interests that are involved in many appeals is exemplified in the history of the Douglas cause, the Bargany cause, the Roxburgh cause, and the Queensberry causes. In each of these, it is no exaggeration to say that property was involved to the value of half a million of money. Now, that one single mind, and that the mind of an English judge, should adjudicate on such pure questions of Scotch law, without any assistance from the Scotch bench, is one of the most extraordinary anomalies in the history of jurisprudence. It is a radical and fundamental defect in the constitution of the present appellate jurisdiction, that it wants the Scotch law element. It violates a fundamental and sacred principle in the constitution of all courts of law, namely, that the courts should be presided over by a judge versant, and capable of judging, in the law to be administered, without which they cannot enjoy the confidence of the country. This is universally adopted. Accordingly, in the constitution of the Privy Council, which is a sovereign court of appeal, this principle is practically admitted. *There* the different laws in the British colonies, in so far as they vary from the law of England, are fairly represented by some judge versant in those laws, sitting along with the law Lords. Even in judging in Irish appeals, this principle is admitted.

It has been said that the appellate jurisdiction in Scotch appeals has hitherto worked well, and has given satisfaction. Fully acknowledging the remarkable ability of the many eminent English judges who have adorned the woolsack, we think that this statement is capable of such an answer as entirely deprives it of any weight, in considering the expediency of improving the constitution of the appellate tribunal in appeals from Scotland. Lord Camden confessed a positive dislike to sit in Scotch appeals, on no other ground than that the Scotch law was not familiar to him. The consequence was, that he invariably relieved himself, where he could possibly lay the duty on another—generally on Lord Hardwicke or Lord Mansfield; but then, Lords Hardwicke and Mansfield were both of them great masters of the Roman law, on which the law of Scotland is founded. Lords Mansfield and Loughborough had studied the law of Scotland as a separate system; and both, while at the bar, had long years' experience in pleading Scotch appeals. They were both versant in the feudal system. These circumstances were, however, accidental. On the other hand, Lord Bathurst acknowledged his total incapacity, by handing over the Scotch appeals to Lord Mansfield.

Even Lord Eldon, on many occasions, showed himself uneasy

and at great difficulty in judging in Scotch appeals. The bias of the English lawyer, which he sought most anxiously to guard against, was apt, he confessed, to give a turn to the judgment which was not expected. Accordingly, his difficulty and hesitation in Scotch appeals were great; and too frequently produced no result, but a remit back to the Court for reconsideration, which remit ended often with the same judgment as before; or, if the parties could not stand a *second* or *third* appeal, ended with compromise or with ruin. This hesitancy on the part of Lord Eldon arose from the judgment of the Court of Session appearing to him to be inconsistent with what he, as an English lawyer, considered should have been the judgment, or on some misunderstanding on Scottish points of form.

In the Roxburgh causes, disposed of by Lord Eldon in the House of Lords, Viscount Melville was obliged to interfere, when Lord Eldon had tabled a motion as to the procedure in the Court of Session in that case, and by explanations familiar to all Scotch lawyers, and upon the authority of Stair and Erskine, obliged the Chancellor to withdraw his motion.

Lord Redesdale—a very eminent judge—confessed that he participated in the same difficulty in the Queensberry cases (1819). ‘It is,’ said he, ‘a very difficult task unquestionably, for persons who are not familiar with the administration of the law of any country, to apply their minds so fully as those who are familiar with it. No person can feel that more strongly than myself. Having been for a twelvemonth only in the situation of Speaker of the other House of Parliament, and therefore absent from courts of justice, I certainly did not find myself, when I returned again to a judicial situation, so capable of applying my mind to the subject as I should have been if there had been an interval between my following the profession at the bar, and my holding the situation of Chancellor of Ireland. I heard that one of the most able men that ever sat in the Court of Chancery in this country (Lord Cowper), having ceased for four years to be Chancellor, in consequence of a change in the Administration, when he afterwards came back to the office of Chancellor, often declared that he did not feel himself so ready in the discharge of his duty in that office as he had been before. Whenever, therefore, I judge of a case of Scotch law (being bound, nevertheless, by the situation in which I stand to form a judgment upon it as well as I can, and as every one of your

Lordships is bound), I always have a jealousy of myself upon the subject, and always endeavour most particularly to divest myself of anything that can be called English prejudice. I hold that to be a most imperious duty, because I must admit that it is likely such prejudice should exist in my mind.'

It thus appears, that eminent as these judges undoubtedly were, none of them was insensible to the difficulties attending the discharge of his duty in the disposal of Scotch appeals. If even an absence from judicial duty, from change of Ministry or other causes, made a Chancellor, on his return to office, less ready and capable for the discharge of the judicial functions, how much less capable must that judge be, who, through his whole professional life, has been disassociated from the practice of Scotch law.

These defects in the appellate jurisdiction are made more apparent by marking a few of the changes which it has wrought in the law of Scotland by the force of decisions, thus suddenly wrenching the law from its ancient bases.

At one time the fetters of an entail were held to apply to the institute as well as the substitute heirs, under the general term 'heirs of tailzie;' but in the Duntreath case this law, which had existed for nearly half a century, was changed by Lord Mansfield by a reversal in the House of Lords, although with much dissatisfaction among the highest legal authorities on the bench both in Scotland and England—Lord Eldon having always disapproved of that judgment. Until the Queensberry cases occurred on the Neidpath and Queensberry entails, it was understood as law that leases could be granted to any extent and duration, where not *expressly prohibited*; but in these cases it was held that leases beyond the ordinary period of endurance were *alienations*, and fell under the prohibitory clause, to 'alienate' or '*dispone*.' In like manner, for more than half a century it had been understood that an heir substitute of entail, disappointed of the succession from defect in the irritant and resolute clauses not applying to sales, was still entitled to insist on the reinvestment of the price, as against the heir in possession; and two or three decisions had been pronounced in the Court of Session to that effect. But in the Ascog case, although the previous decisions were confirmed by the whole court (11 judges for it, 4 against it), this law was upset in the House of Lords by one single English judge,—thus unsettling things long at rest.

Examples of a similar nature are referred to by the distinguished

witnesses examined under the Royal Commission on the Amendment of the Appellate Jurisdiction. The result is, that instead of the House of Lords sitting as a Court of Session judging in conformity with the law of Scotland, new law is engrafted on our system in a way that must make the law of Scotland ever unfixed and uncertain.

In proposing a reform of the appellate jurisdiction in so far as Scotch appeals are concerned, we have no objections to the constitution of the appeal tribunal as it now exists, in so far as the English appellate jurisdiction is concerned. The Queen's subjects are entitled to resort to Parliament in its judicial capacity for redress against the decrees of other tribunals. There is no necessity for touching or altering its constitution. All that is necessary is to supply a very glaring defect in this constitution, by introducing into the judicial department the Scotch law element—by calling or appointing a Scotch judge to the House of Lords as a peer of the realm, to assist not only in the disposal of Scotch appeals, but in all other cases which came before the Court. It may be matter of little importance whether this judge is selected from among the leaders of the bar, or the heads of the Court of Session. From either of those two departments may be selected a judge of the highest attainments, both judicial and otherwise, and whose decisions would inspire confidence and reflect credit upon the Government making the appointment.

Here, however, we must anticipate and answer some objections. The removal of the defect in the appellate jurisdiction is, as we have stated, to be accomplished by appointing a Scotch judge, with a peerage, to sit in the House of Lords as a member of the court of appellate jurisdiction. It may be objected, that this proposal necessarily presupposes the competency of Scotch judges to sit and judge in English appeals; and if so, why may English judges not sit and dispose of Scotch appeals? The answer to this is obvious. We object in Scotland to the *exclusion* of the Scotch element from the court of last resort. It has never been maintained that valuable aid may not be rendered by judges of a different jurisdiction, and versed in the general principles of jurisprudence. The proposition of calling a Scotch judge to the House of Lords to *assist* in Scotch appeals, and take part in the disposal of English appeals, is not the same with the system of English judges *exclusively*, without any

Scotch element in the tribunal, judging in Scotch appeals. In the former case, the Scotch judge does not judge alone without the assistance of eminent English judges. Under the existing system, it is the English judges who alone determine without any assistance from any Scotch judge whatever.

Another objection has been stated as an insuperable difficulty ; but which, when looked fairly in the face, ought not to stand in the way of a remedy for a moment. It is said, that appointing a Scotch judge as a peer of the realm would involve difficulties as to the prerogative of the Crown. We do not profess to understand that objection, or to see how the necessary elevation of a Scotch Lord of Session to the peerage should be a greater interference with the prerogative, than the necessary elevation of an English or an Irish Chancellor. But the objection, whatever it means, is disproved by the fact, that the judges of the Court of Session were, before the Union, frequently elevated to the peerage. Since then, their elevation to such honours has been totally denied and ignored. It first degenerated into the creation of a few of them baronets, and even this ceased altogether ; and the practice of conferring such honours is now numbered among the things that are past. While, in Ireland, the head of the bench is not unfrequently rewarded with a peerage, the Scotch judges, however distinguished in the service of their country, have been systematically excluded from that honour. It would be easy to collect from the roll of judges who have filled the President's chair, the names of many whose fortune and position, as well as their learning, would have made the distinction of a peerage a natural and appropriate reward of professional eminence. We need only refer to President Dalrymple, President Dundas, President Hope, President Boyle, to justify this remark ; not to mention other judges connected with the peerage, such as Minto, Haddo, Henderland, and others.

But, with or without the peerage, we maintain that the appellate jurisdiction of the House of Lords must ever remain defective as a tribunal for hearing Scotch appeals, until a Scotch judge form a permanent part of it.

With reference to remits back to the Court of Session to reconsider the case, which, in the time of Lords Thurlow and Eldon, became a gigantic evil, it is only necessary to advert to the enormous expense of a single appeal to realize fully the magnitude of this evil. The amount of a bill of costs is quite frightful to con-

template. The fees paid, even in the initiatory stages, to clerks, and for printing, exceed all reasonable belief. Then the high fees to counsel, given far beyond what is allowable on taxation, and solicitors' extra charges, are so enormous, as virtually to close the door of the appellate court against all but the very rich and the very poor. Of these two classes, the pauper is the best off; for it not unfrequently happens that the rich man in a successful appeal gains his point, but loses his estate in the fearful contest, and is beggared for life; whereas the pauper, whether he gains or not, has nothing to lose. The costs, too, that are given in a successful appeal, are so inadequate, that unless the stake is of considerable magnitude, it is scarcely worth while to enter the lists even with a competitor who is worth powder and shot.

THE MONTH.

A Protest against Finality Clauses.—The opinion, we believe, is very generally entertained by those who are most conversant with the practical working of suspensions and appeals, that the clauses so anxiously introduced into Scotch Acts of Parliament for the purpose of securing finality for the judgments of the Sheriffs and inferior magistrates are illusory and useless. Whether official ingenuity is capable of devising some yet more stringent formula of exclusion, which shall have the merit of accomplishing the object in view, is a problem that requires to be solved. We think the difficulties are insuperable, and that the object in view, the absolute exclusion of appellate jurisdiction, is in the last degree undesirable.

The aspect in which the subject presents itself to the judicial mind is, that the exclusion of the right of appeal is virtually equivalent to a license to commit injustice. Actuated by the desire to protect the subject from oppression at the hands of inferior magistrates, the court of review proceeds to criticise the letter of the excluding enactment in a hostile spirit. If the excluding words are not so comprehensive as to apply to all known modes of review, they will be rendered literally. If sufficiently comprehensive, they are, at all events, susceptible of a 'sound judicial construction.' Only assume, for example, that the Legislature could not be supposed to have intended to deprive the supreme court of its inherent power

of correcting the irregularities of all inferior tribunals ; it follows almost as of course, that the contemplated exclusion must have reference to review on the merits of the case ; and that a judge who acts in excess of the statutory powers conferred upon him has no protection.

In one sense, these finality clauses have failed most signally. They have not prevented, but have rather stimulated and promoted, a great deal of litigation upon the construction of the statutes in which they occur. They have certainly had the effect of enormously increasing the expenses of litigation, and—what is even more to be deplored—of shifting the field of controversy from the real merits of the question in dispute to the airy and transcendental sphere of jurisdiction. We happened to be present last winter at all the sittings of the Court of Justiciary in its appellate capacity. We could not help wondering what sort of notion respecting our laws, the proceedings which we witnessed would have conveyed to the mind of any intelligent Englishman or foreigner who might have been present. What was least to be deprecated, and what probably would have happened, was, that being utterly unable to comprehend the import of any single sentence that was uttered throughout the discussions, he might have gone away impressed with the conviction that the Scotch lawyers were the most learned persons, and Scotch jurisprudence the most erudite system in existence.

The effect produced upon our own mind was somewhat different. We imagined we were assisting at one of the disputations of the schoolmen. Distinctions were bandied in argument quite worthy of the ancient profession of casuistry ; while the staple of the arguments consisted in discussions about ‘the nature of things.’ We listened to much ingenious pleading upon the nature of offences, whether criminal or civil ; wiredrawn disquisitions upon the nature of penalties ; refined disputations upon the nature of grounds of appeal, whether involving competency or merits. Two questions were chiefly agitated : the one, whether the court of instance had exceeded its jurisdiction ; the other, whether the court of review might, could, or should exceed *its* jurisdiction by entertaining the appeal. The table and floor of the court were strewn with books bearing reference to those subtleties of pleading ; and, over and above, there was a plentiful, and, it is to be hoped, a correct citation of cases from the stores of memory.

Tired of this wordy warfare, we entered the Faculty Library,

sacred on Mondays to gossip and friendly intercourse. But the demon of jurisdiction had invaded the sanctum, and disturbed the equanimity of the members. One middle-aged junior had given up his morning walk to search for precedents, and was still seeking for a clue to the labyrinth of conflicting cases. Another, who but yesterday was bowled out in an entail case, value L.50,000, and took his punishment with a smile on his face, was now in despair about a L.5 fine ; and was openly anathematizing the Forbes Mackenzie Act, and indulging in disloyal expressions respecting her Majesty's Courts. Another pair of disconsolates, having discovered that they were opponents for the nonce, were sitting down to discuss the jurisdiction question *more Socratico*. One veteran hand alone seemed unaffected. But think not, reader, that he was upheld by any consciousness of superior resources. He, too, had a jurisdiction case in the roll ; but, ten years before, he had argued a case upon the same statute ; and, thanks to a retentive memory, he had found a report of it. When his name was called, he calmly stood up, tabled his authority, and got *absolvitor* with expenses.

At the close of a long discussion, one of the disputants might be seen to enter the apartment, serene and cheerful ; when something like the following colloquy would take place :—

‘ Well, have you gained your case ?’

‘ Not exactly ; but the Court has sustained the jurisdiction.’

‘ Yes ; and the bill has been refused with expenses ?’

‘ Oh ! of course we couldn't expect to get into the merits ; the statute was too clear against us for that ; but I have established the great principle, that smoking in a railway carriage is a criminal offence, and cognizable by the Court of Justiciary.’

‘ Indeed ! then I'm done for ; but let me see : it was found in a previous case, that smoking on the top of an omnibus was “ civil ;” though the Pr—— observed that it might be considered decidedly *uncivil* to light your Havannah in the interior.’

‘ I shall let you into the secret ; the whole question turns upon the word “ or.” In the Railway Clauses Act, the penalties are recoverable by “ poinding *and* imprisonment ;” in the Gorbals Police Extension Act, the warrant is for “ poinding *or* imprisonment.” Hence the inhabitants, although forbidden to pollute the atmosphere of that fragrant suburb with the noxious vapours of the tobacco-leaf, are under no immediate peril as to their personal liberty in respect of contravention.’

‘Many thanks; but I had thought the circumstance of the warrant of imprisonment entering the sentence had something to do with the question of civil or criminal.’

‘By no means. In the Day Poaching Act the warrants are separate, and yet the Court of Justiciary has jurisdiction; in the Forbes Mackenzie Act it has been held competent to include both in one interlocutor, and yet the jurisdiction is purely civil.’

The first speaker, thrice armed in the knowledge of the wondrous virtues of an ‘or,’ advanced to the table, confuted the sophistry which would impute criminality to the gentleman who had incurred a debt of forty shillings to his clients, the Railway Company, by smoking in their carriages, and got the bill thrown out. But, unfortunately, this victory was but the harbinger of future defeat; for, in a subsequent suspension in the Court of Session, their Lordships held, that although civil as regards the quality of jurisdiction, the statute contemplated a *criminal procedure*. The magistrate had exceeded his jurisdiction in allowing the culprit to be interrogated; and the company, we are at liberty to suppose, may have had a considerable sum to pay, to avoid a threatened action of damages, for putting the illegal warrant into execution.

It will not be supposed that we have intended, in the above bird’s-eye sketch, to cast any discredit on the case law, in regard to civil and criminal jurisdiction. The fault lies with the Legislature, or with those on whose responsibility Parliament has accepted enactments confused and contradictory, following no settled order of style, and, as it were, purposely confounding the distinctions betwixt civil and criminal process. In these statutes, the Legislature has shown an ignorant jealousy of the interference of the supreme courts; and the courts, although doing their utmost to protect the subject from oppression, have been involved in hopeless difficulties, in consequence of the impossibility of reconciling the inconsistent expressions used in the statutes.

We think, however, that legislation on the subject has become absolutely necessary, in order to prevent the administration of appellate jurisdiction by the Court of Justiciary from degenerating into a sham. Why should any man, who wants to know whether the Act under which he was convicted warrants the imposition of a certain penalty, be prevented from going into that question; and compelled to spend his money in arguing the barren question, whether the offence, the existence of which is in question, be civil

or criminal? It is clear that parties subjected to penalties *will* litigate. Then, we say, let them litigate about the question of law, if there is one, and not about the right to litigate.

What we would suggest is, that a power should be given to any two judges of the Courts of Justiciary or Session to hear parties upon any question of law arising under a summary prosecution, provided the point is reserved by the Sheriff or magistrate, and stated in a case. The method of appeal upon a stated case has been already in operation for some years under the provisions of the Lands Valuation Act. An abstract of the determinations of the Court of Appeal appeared very lately in our pages. This mode of appeal has a much wider sphere of operation in England, under the Act 20 Vict., c. 43. The working of the statute has elicited the most unqualified encomiums from the organs of professional opinion in England. Already the decisions of the Court of Appeal—which will be found reported under the title of ‘Magistrates Cases’ in the ‘Law Journal’ Reports—present a valuable commentary on the statute law of England and Ireland, and have been the means of relieving the local judges from many embarrassing questions as to their duties and jurisdictions; and there is no reason to doubt that the system could be transplanted with perfect propriety and success to this part of the kingdom.

We observe that, in spite of the indisposition of the superior courts to recognise and give effect to clauses exclusive of their jurisdiction, every session brings forth its harvest of Scotch bills, in which—no matter what the subject, how novel the principle, or how intricate the machinery provided for its execution—we are sure to find the stereotyped clause, that ‘no judgment or decree to be pronounced in virtue of this Act, shall be subject to review by advocacy, suspension, reduction, or any other process.’ Among the bills of the present session which repeat this parrot cry, we may mention Mr Mure’s useful measure for the regulation of Public-houses, and Mr Massey’s Copyright Bill. In the latter bill, the clause, if not unmeaning, is highly mischievous, as going to exclude the opportunity of obtaining a decision of the Court of Session on the important legal questions that may arise upon the new species of copyright property created by the statute. It is remarkable that, although the bill is made to apply to the whole United Kingdom and the British Colonial possessions, there is no exclusion of appellate jurisdiction as regards any other of her Majesty’s superior courts except those of Scotland.

Apparently the draftsman of the bill, wishing to adapt its requisitions to Scotch procedure, has dipped into our statute law; and finding this clause to be of pretty frequent occurrence, he no doubt imagined that 'advocation' and 'suspension' were analogous to the procedure by 'essoign or wager of law,' which used to be so jealously excluded in the English revenue statutes,—obsolete forms possessing latent capabilities for mischief, and which, therefore, would require to be disallowed.

On behalf of the profession, whose ingenuity and powers of research have been so needlessly taxed, to assist in the solution of unprofitable questions as to competency, and civil or criminal jurisdiction, we entreat those members of the Legislature not to add to the complexity of this branch of the law by the introduction of finality clauses into future statutes. If we may not have the benefit of a general Act providing for a summary form of review, let some such provision at least be inserted in all future enactments which confer a special power of jurisdiction upon the inferior courts of this country. By this means, the expense attending the execution of the Acts will be greatly lessened, and the appellate jurisdiction spared the reproach of being powerless for legitimate interpretation, and only operative in a manner which involves all the evils of uncertainty, delay, and unprofitable expenditure.

Vacancies and Appointments.—We have this month to notice two legal appointments, both of which have for some time been expected,—one academical, the other judicial. The appointment of Mr Dove Wilson to be Sheriff-substitute in Kincardine is a satisfactory one, as Mr Wilson, although he had not been long enough in the profession to take a position among the practising men, was known to be a sound scholar and a clear-headed lawyer. During the short time he has occupied the bench at Stonehaven, he has shown a decided aptitude for the discharge of the judicial functions, and has gained the confidence and esteem of the profession.—The other appointment to which we refer is that of Mr James Lorimer, advocate, to be Professor of Public Law. Mr Lorimer is well known as the author of some thoughtful works. Considering the feeling that exists in favour of making the selection to legal-academical appointments from the ranks of the senior bar, this appointment is probably the best practicable, although it must be admitted that

neither in respect of practice, nor by any notable contribution to the philosophy of jurisprudence, had Mr Lorimer established his claim to the appointment.

It will be observed that Mr Swinton, who has so long and creditably fulfilled the duties of Civil Law professor, has now retired. The appointment virtually rests with the Faculty of Advocates. We understand that Mr J. Montgomerie Bell, Mr Norman Macpherson, and Mr A. Beatson Bell, advocates, are already in the field as candidates for the chair.

NEW BILLS BEFORE PARLIAMENT.

A Bill to Facilitate the Transmission of Moveable Property in Scotland.

WHEREAS it is expedient to facilitate the Transmission of Moveable Estate in Scotland: Be it enacted by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, as follows:

1. From and after *the passing of this Act*, it shall be competent to any Party, in right of a Personal Bond or of a Conveyance of Moveable Estate, to assign such Bond or Conveyance by Assignment in or as nearly as may be in the Form set forth in Schedule A. hereto annexed; and it shall be competent to write the Assignment or Assignations on the Bond or Conveyance itself in or as nearly as may be in the Form set forth in Schedule B. hereto annexed; which Assignment shall be registrable in the Books of any Court, in Terms of any Clause of Registration contained in the Bond or Conveyance so assigned; and such Assignment, upon being duly stamped and duly intimated, shall have the same Force and Effect as a duly stamped and duly intimated Assignment according to the Forms at present in use.

2. An Assignment shall be validly intimated (1) by a Notary Public delivering a Copy thereof, certified as correct, to the Person or Persons to whom Intimation may in any Case be requisite, or (2) by the Holder of such Assignment, or any Person authorized by him, transmitting a Copy thereof certified as correct by Post to such Person; and (in the First Case) a Certificate by such Notary Public in or as nearly as may be in the Form set forth in Schedule C. hereto annexed, and (in the Second Case) a written Acknowledgment by the Person to whom such Copy may have been transmitted by Post as aforesaid of the Receipt of the Copy, shall be sufficient Evidence of such Intimation having been duly made: Provided always, that if the Deed or Instrument containing such Assignment shall likewise contain other Conveyances or Declarations of Trust Purposes, it shall not be necessary to deliver or transmit a full Copy thereof, but only a Copy of such Part thereof as respects the Subject Matter of such Assignment.

3. Nothing in this Act contained shall prevent the Transmission of any Personal Bond or Conveyance of Moveable Estate, or the Intimation of any Assignment according to the Forms at present in use.

4. The following Words in this Act, and in the Schedules annexed to this Act, shall have the several Meanings hereby assigned to them, unless there be something in the Subject or Context repugnant to such Construction; that is to say, the Word 'Bond' and the Word 'Conveyance' shall extend to and include Personal Bonds for Payment or Performance, Bonds of Caution, Bonds

of Guarantee, Bonds of Relief, Bonds and Assignations in Security of every Kind, Decrees of any Court, Policies of Assurance of any Assurance Company or Association in Scotland, whether held by Parties resident in Scotland or elsewhere, Protests of Bills or of Promissory Notes, Dispositions, Assignations, or other Conveyances of Moveable or Personal Property or Effects, Assignations, Translations, and Retrocessions, and also Probative Extracts of all such Deeds from the Books of any competent Court; the Word 'Assignation' shall also include Translations and Retrocessions, and Probative Extracts thereof; the Words 'Moveable Estate' shall extend to and include all Personal Debts and Obligations, and Moveable or Personal Property or Effects of every Kind.

5. This Act may be cited for all Purposes as the 'Transmission of Moveable Property (Scotland) Act, 1862.'

SCHEDULES referred to in the foregoing Act.

SCHEDULE A.

I A. B., in consideration of, &c. [*or otherwise, as the Case may be*], do hereby assign to C. D. and his Heirs or Assignees [*or otherwise, as the Case may be*], the Bond [*or other Deed, describing it*], granted by E. F., dated, &c., by which [*here specify the Nature of the Deed, and specify also any connecting Title, and any Circumstances requiring to be stated in regard to the Nature and Extent of the Right required*]. In witness whereof, &c.

[*Insert Testing Clause in usual Form.*]

SCHEDULE B.

I A. B., in consideration of, &c. [*or otherwise, as the Case may be*], do hereby assign to C. D. and his Heirs or Assignees [*or otherwise, as the Case may be*], the foregoing [*or within-written*] Bond [*or other Writ or Deed, describing it*], granted in my Favour [*or otherwise, as the Case may be, specifying any connecting Title, and any Circumstances requiring to be stated in regard to the Nature and Extent of the Right assigned*]. In witness whereof, &c.

[*Insert Testing Clause in usual Form.*]

SCHEDULE C.

I (A) _____ of the City of _____ Notary
Public, do hereby attest and declare, That upon the _____
Day of _____ and between the _____
Hours of _____ and I duly intimated to B.
[*here describe the Party*] the within written Assignation [*or otherwise, as the Case may be*], or an Assignation granted by [*here describe it*], and that by delivering to the said A. personally [*or otherwise*] by leaving for the said A. within his Dwelling House at E., in the Hands of [*here describe the Party*], a full Copy thereof, [*or if a partial Copy here quote the Portion of the Deed which has been delivered*], to be given to him; all of which was done in presence of C. and D. [*here name and describe the Two Witnesses*], who subscribe this Attestation along with me. In witness whereof.

[*Insert Testing Clause in usual Form, to be subscribed by the Party and the Two Witnesses.*]

A Bill [as amended in Committee] for Amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works.

Preamble.—1. The Author of every Painting, Drawing, and Photograph which shall be or shall have been made, either in the British Dominions or elsewhere, and which shall not have been sold or disposed of before the Commencement of this Act, and his Assigns, shall have the sole and exclusive Right of copying, reproducing, and multiplying such Painting or Drawing, and the Design thereof, or such Photograph, and the Negative thereof, by any Means

and of any Size, for the Term of the natural Life of such Author, and Seven Years after his Death; provided that when any Painting or Drawing, or the Negative of any Photograph, shall be for the First Time sold or disposed of after the passing of this Act, the Person so selling or disposing of the same shall not retain the Copyright thereof, unless it be expressly reserved to him by Agreement in Writing, signed, at or before the Time of such Sale or Disposition, by the Vendee or Assignee of such Painting or Drawing, or of such Negative of a Photograph, nor shall the Vendee or Assignee thereof be entitled to any such Copyright, unless, at or before the Time of such Sale or Disposition, an Agreement in Writing, signed by the Person so selling or disposing of the same, or by his Agent duly authorized, shall have been made to that Effect.

2. Copyright not to prevent the Representation of the same Subjects in other Works.

3. Assignments, Licences, &c., to be in Writing.

4. **CLAUSE A.**—Register of Proprietors of Copyright in Paintings, Drawings, and Photographs to be kept at Stationers' Hall.

5. **CLAUSE B.**—Certain Enactments of recited Act of the 6th Year of Victoria to apply to the Books to be kept under this Act.

6. Penalties on Infringement of Copyright.

7. No Person shall do or cause to be done any or either of the following Acts; that is to say,

First, no Person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any Painting, Drawing, or Photograph, or the Negative thereof, any Name, Initials, or Monogram:

Secondly, no Person shall fraudulently sell, publish, exhibit, or dispose of, or offer for Sale, Exhibition, or Distribution, any Painting, Drawing, or Photograph, having thereon the Name, Initials, or Monogram of a Person who did not execute or make such Work:

Thirdly, no Person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any Copy or colourable Imitation of any Painting, Drawing, or Photograph, whether there shall be subsisting Copyright therein or not, as having been made or executed by the Author or Maker of the original Work from which such Copy or Imitation shall have been taken:

Fourthly, where the Author or Maker of any Painting, Drawing, or Photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the Possession of such Work, if any Alteration shall afterwards be made therein by any other Person, by Addition or otherwise, no Person shall be at liberty, during the Life of the Author or Maker of such Work, without his Consent, to make or knowingly to sell or publish, or offer for Sale, such Work or any Copies of such Work so altered as aforesaid, or any Part thereof, as or for the unaltered Work of such Author or Maker.'

Every Offender under this Section shall, upon Conviction, forfeit to the Person aggrieved a Sum not exceeding Ten Pounds, or not exceeding double the full Price, if any, at which all such Copies, Engravings, Imitations, or altered Works shall have been sold or offered for Sale; and all such Copies, Engravings, Imitations, or altered Works shall be forfeited to the Person, or the Assigns or legal Representatives of the Person, whose Name, Initials, or Monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the Penalties imposed by this Section shall not be incurred unless the Person whose Name, Initials, or Monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within Twenty Years next before the Time when the Offence may have been committed.

8. Pecuniary Penalties in Scotland may be recovered by Action before the Court of Session in ordinary Form, or by summary Action before the Sheriff of the County where the Offence may be committed or the Offender resides, who, upon

Proof of the Offence or Offences, either by Confession of the Party offending, or by the Oath or Affirmation of One or more credible Witnesses, shall convict the Offender, and find him liable to the Penalty or Penalties aforesaid, as also in Expenses, and it shall be lawful for the Sheriff, in pronouncing such Judgment for the Penalty or Penalties and Costs, to insert in such Judgment a Warrant, in the event of such Penalty or Penalties and Costs not being paid, to levy and recover the Amount of the same by Pounding: Provided always, that it shall be lawful to the Sheriff, in the event of his dismissing the Action and absolving the Defender, to find the Complainer liable in Expenses, and any Judgment so to be pronounced by the Sheriff in such summary Application shall be final and conclusive, and not subject to Review by Advocation, Suspension, Reduction, or otherwise.

9. CLAUSE C.—Superior Courts of Record in which any Action is pending may make an Order for an Injunction, Inspection, or Account.

10. Importation of pirated Works prohibited. Application in such Cases of Customs Acts.

11. Saving of Right to bring Action for Damages.

A Bill to amend 'The Merchant Shipping Act, 1854,' 'The Merchant Shipping Act Amendment Act, 1855,' and 'The Customs Consolidation Act, 1853.'

Delivery of Goods and Lien for Freight.

52. Interpretation of Terms.

53. Where the Owner of any Goods imported in any Ship from Foreign Parts into the United Kingdom fails to make Entry thereof, or having made Entry thereof, to land the same or take Delivery thereof, and to proceed therewith with all convenient Speed, by the Times severally herein-after mentioned, the Shipowner may make Entry of, and land or unship the said Goods at the Times, in the Manner, and subject to the Conditions following; (that is to say,)

- (1.) If a Time for the Delivery of the Goods is expressed in the Charter Party or Bill of Lading, and the Ship is a Steam Ship, then at any Time after the Time so expressed:
- (2.) If a Time for the Delivery of the Goods is expressed in the Charter Party or Bill of Lading, and the Ship is a Sailing Ship, then at any Time after the Time so expressed, not being less than *Forty-eight* Hours, exclusive of a Sunday or Holiday, after the Report of the Ship:
- (3.) If no Time for the Delivery of the Goods is expressed in the Charter Party or Bill of Lading, then, whether the Ship is a Steam Ship or a Sailing Ship, at any Time after the Expiration of *Seventy-two* Hours, exclusive of a Sunday or Holiday, after the Report of the Ship:
- (4.) If any Wharf or Warehouse is named in the Charter Party or Bill of Lading as the Wharf or Warehouse where the Goods are to be placed, and if they can be conveniently there received, the Shipowner in landing them by virtue of this Enactment shall cause them to be placed on such Wharf or in such Warehouse:
- (5.) In other Cases the Shipowner in landing Goods under this Enactment shall place them in or on some Wharf or Warehouse which has been duly approved by the Commissioners of Customs for the landing of dutiable Goods and on or in which Goods of a like Nature are usually placed:
- (6.) If at any Time before the Goods are landed or unshipped the Owner of the Goods is ready and offers to land or take Delivery of the same, he shall be allowed so to do, and, if he has not already entered the Goods, to make entry thereof, and his Entry shall in such Case be preferred to any Entry which may have been made by the Shipowner:
- (7.) If any Goods are, for the Purpose of Convenience in assorting the same, landed at the Wharf where the Ship is discharged, and the Owner of the Goods at the Time of such landing has made Entry and is ready, and

offsets to take Delivery thereof, and to convey the same to some other Wharf or Warehouse, the Expense of such landing shall be borne by the Shipowner.

54. If, when Goods are landed, the Shipowner give Notice for that Purpose, the Lien for Freight is to continue.

55. Lien to be discharged on Proof of Payment.

56. Lien to be discharged on Deposit with Warehouse Owner.

57. If such Deposit as aforesaid is made with the Wharf or Warehouse Owner, and the Person making the same does not within *Fifteen Days* after making it give to the Wharf or Warehouse Owner Notice in Writing to retain it, stating in such Notice the Sum, if any, which he admits to be payable to the Shipowner, or, as the Case may be, that he does not admit any Sum to be so payable, the Wharf or Warehouse Owner may, at the Expiration of such *Fifteen Days*, pay the Sum so deposited over to the Shipowner, and shall by such Payment be discharged from all Liability in respect thereof.

58. If such Deposit as aforesaid is made with the Wharf or Warehouse Owner, and the Person making the same does within *Fifteen Days* after making it give to the Wharf or Warehouse Owner such Notice in Writing as aforesaid, the Wharf or Warehouse Owner shall immediately apprise the Shipowner of such Notice, and shall pay or tender to him out of the Sum deposited the Sum, if any, admitted by such Notice to be payable, and shall retain the Remainder or Balance, or if no Sum is admitted to be payable, the whole of the Sum deposited, for *Thirty Days* from the Date of the said Notice; and at the Expiration of such *Thirty Days*, unless legal Proceedings have in the meantime been instituted by the Shipowner against the Owner of the Goods to recover the said Balance or Sum or otherwise for the Settlement of any Disputes which may have arisen between them concerning such Freight or other Charges as aforesaid, and Notice in Writing of such Proceedings has been served on him, the Wharf or Warehouse Owner shall pay the said Balance or Sum over to the Owner of the Goods, and shall by such Payment be discharged from all Liability in respect thereof.

59. If the Lien is not discharged, and no Deposit is made as herein-before mentioned, the Wharf or Warehouse Owner may, at the Expiration of *Ninety Days* from the Time when the Goods were placed in his Custody, or, if the Goods are of a perishable Nature, at such earlier period as he in his Discretion thinks fit, sell by Public Auction, either for Home Use or Exportation, the said Goods or so much thereof as may be necessary to satisfy the Charges herein-after mentioned.

60. Notices of Sale to be given.

61. Monies arising from Sale, how to be applied.

62. Whenever Goods are placed in the Custody of a Wharf or Warehouse Owner under the Authority of this Act, the said Wharf or Warehouse Owner shall be entitled to Rent in respect of the same, and shall also have Power from Time to Time, at the Expense of the Owner of the Goods, to do all such reasonable Acts as in the Judgment of the said Wharf or Warehouse Owner are necessary for the proper Custody and Preservation of the said Goods, and shall have a Lien on the said Goods for the said Rent and Expenses.

63. Nothing herein contained shall compel a Wharf or Warehouse Owner to take charge of any Goods which he would not be liable to take charge of if this Act had not passed, nor shall he be responsible for or affected by the Invalidity of any Lien claimed by any Shipowner; and nothing herein contained shall take away or diminish any Rights or Remedies given to any Shipowner or Wharf or Warehouse Owner by any Local Act.

64. Nothing contained in the Provisions of this Act concerning the landing of Goods or the Lien for Freight shall extend to repeal, alter, or affect any of the Provisions of 'The Mersey Dock Acts Consolidation Act (1858).'

A Bill to make further Provision respecting Lunacy in Scotland.

Preamble.—1. Interpretation.—2. Existing Board abolished.—3. Constitution of General Board of Lunacy.—4. Salary and Allowances to Members of the Board.—5. Annual Payments for defraying Salary and Allowances.—6. Board to fix Sums required, and Payments to be made by Parochial Boards and Superintendents.—7. Commissioners and Deputy-Commissioners to be Inspectors and Deputy-Inspectors.—8. Duties of Inspectors and Deputy-Inspectors. 9. Secretary and Clerks to continue in Office.—10. Meetings of the Board.—11. Board may license Lunatic Wards of Poorhouses.—12. Board may sanction the Reception of Pauper Lunatics in Poorhouses.—13. Board may grant Special Licences for Reception in Houses of not more than Four Pauper Lunatics.—14. Secretary of State may authorize the Board to apply to Court of Session.

15. The Thirty-fourth Section of the first-recited Act is hereby repealed; and in lieu thereof be it enacted, That it shall be lawful for the Sheriff of the County in which a Lunatic is resident, or in which any Public, Private, or District Asylum, or Poorhouse with a Lunatic Ward, or House in Terms of this Act, is situate, to grant an Order for the Reception of such Lunatic into any such Public, Private, or District Asylum or House, or if a Pauper Lunatic into any such Asylum or House or into the Lunatic Ward of any such Poorhouse; but no such Order shall be granted unless upon a Petition subscribed by the Party applying for the same, accompanied by a Statement of Particulars in the Form of Schedule (C.) to the first-recited Act annexed, and setting forth the Degree of Relationship or other Capacity in which the Petitioner stands to such Lunatic, and also accompanied by Certificates in the Form of Schedule (D.) to the first recited Act annexed, bearing Date within Fourteen clear Days next preceding the Date of the Petition, under the Hands of Two Medical Persons, having no immediate or pecuniary Interest in the Asylum in which the Lunatic shall be placed, but one of whom may notwithstanding be the Medical Superintendent or Consulting or Assistant Physician of such Asylum if a Public or District Asylum; and such Orders shall be in the Form of Schedule (E.) to the first-recited Act annexed; and no Superintendent of any such Public, Private, or District Asylum or House shall receive or detain any Person as a Lunatic therein, unless there shall be produced to and left with such Superintendent such Order by the Sheriff, dated within *Fourteen* clear Days prior to the Reception of such Lunatic, or if such Order be granted by the Sheriff of Orkney and Shetland, within *Twenty-one* clear Days prior thereto; provided that the Superintendent of any Public, Private, or District Asylum may receive and detain therein, for any Period not exceeding *Three* Days, and without any Order by the Sheriff, any Person as a Lunatic, whose Case is duly certified to be One of Emergency by One Medical Person other than the Medical Superintendent, Consulting or Assistant Physician of such Public, Private, or District Asylum.

16. The Eighty-fifth Section of the first-recited Act is hereby repealed, and in lieu thereof be it enacted, That when any Lunatic shall have been apprehended, charged with Assault or other Offence inferring Danger to the Lieges, or where any Lunatic shall be found in a State threatening Danger to the Lieges, or in a State offensive to public Decency, it shall be lawful for the Sheriff, upon Application by the Procurator Fiscal or Inspector of the Poor, or other Person, accompanied by a Certificate from a Medical Person, bearing that the Lunatic is in a State threatening such Danger, or in a State offensive or threatening to be offensive to public Decency, forthwith to commit such Lunatic to some Place of safe Custody; and the Sheriff shall thereupon direct Notice to be given, in some Newspaper circulated in the County within which such Lunatic was apprehended, of such Commitment, and that it is intended to inquire into the Condition of such Lunatic on an early Day to be named, and shall also direct Notice of the Application to be given to the Inspector of Poor of the Parish within which the Lunatic has been apprehended or found at large (where the Application is not presented by the Inspector of such Parish), and such further

Notice as he shall think fit ; and if the Inspector of the Parish does not within *Twenty-four Hours* undertake, to the Satisfaction of the Sheriff, to make due Arrangements for the safe Custody of such Lunatic, the Sheriff shall accordingly proceed to take Evidence of the Condition of such Lunatic, and upon being satisfied that he is a Lunatic, and in a State threatening Danger to the Lieges, or Offence to public Decency, he shall commit the Lunatic to any Public, Private, or District Asylum within his Jurisdiction, and in case there shall be no such Asylum within the Jurisdiction of the Sheriff, he shall commit such Lunatic to some such Asylum beyond his Jurisdiction ; and an Order authorizing the Superintendent of the Asylum to which the Lunatic may be committed to receive the Lunatic, and authorizing the Transmission of the Lunatic to such Asylum, shall be granted by the Sheriff in respect of every such Commitment ; and such Lunatic shall be detained in such Asylum until cured, or until Caution shall be found for his safe Custody, in which last Case it shall be lawful for the Sheriff, upon Application to that Effect, and on being satisfied as to such Caution, and the Safety and Propriety of such Custody, to authorize the Delivery of the Lunatic to the Person so finding Security ; and the Sheriff, at the Time of granting Warrant to commit such Lunatic to an Asylum, or thereafter in Proceedings following on the said Application, shall pronounce a Judgment finding the Amount of the Expenses connected with the said Application, Inquiry, and Procedure, as the same shall be taxed, and shall grant Decree for such Expenses against the Parish within which the Lunatic shall have been apprehended or found at large, and in favour of the Procurator Fiscal, or other Person (except the Inspector of the Poor) at whose Instance such Application shall have been made and such Inquiry and Procedure conducted, and shall also grant Decree against such Parish and in favour of the Procurator Fiscal or other such Person (except the Inspector of Poor), or in favour of the Superintendent or Keeper of the Asylum to which the Lunatic shall have been committed, for such Sum as may be necessary for the Maintenance of such Lunatic ; and every such Decree shall be final and conclusive, and not subject to Review or Reduction in any way or by any Process whatsoever ; but the Parish so decerned against and paying such Expenses and Cost of Maintenance shall have Relief and Recourse therefor against the Lunatic and his Estate, and any of his Relatives legally liable for his Maintenance, and also against the Parish of Settlement of such Lunatic in the event of the Parish in which the Lunatic was apprehended or found at large not being the Parish of Settlement as accords of Law.

17. Board may determine Number of Patients Asylum is fitted to receive.—18. On Application of Person at whose Instance a Lunatic is detained, Board may authorize his Removal or Liberation on Probation without an Order of the Sheriff.—19. Superintendent to give Intimation of Recovery of a Lunatic.—20. If Parochial Board neglect to provide for Removal of a Pauper Lunatic, Board may take necessary Measures.—21. Insane Prisoners may, on Expiry of Sentence, be detained in General Prison.—22. Orders may be carried out in General Prison.—23. Orders to be intimated to Managers of Prisons.—24. Sentences for less than Nine Months may be carried out in General Prison.—25. Insane Prisoners may be removed to an Asylum.—26. Secretary of State may give Orders for safe Custody of any Person during Her Majesty's Pleasure.—27. Provisions of recited Acts repealed.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

DUNN'S TRUSTEES v. LORD ZETLAND.—*March 18.*

Landlord and Tenant—Improvements—Obligation.

The pursuers are the trustees of the late Mr Alexander Dunn of Dun-tocher, and they have raised the present action for the purpose of having the defender, as the heir-at-law of his grandfather, the late Lord Dundas, ordained to repair certain buildings on the lands of Dalmuir, or to pay L.6500, or whatever sum may be necessary to put them in repair. The lands at Dalmuir, on which the buildings in question were erected, were let by Sir H. Edmonstone to Mr Richard Collins in 1789 for 67 years, and they were subset by Mr Collins to Lord Dundas in 1802 for 55 years, from Martinmas 1806. The sub-tack of 1802 contained the following clause:—‘And the said Thomas Lord Dundas obliges himself and his foresaids to maintain and uphold the whole houses and buildings relative thereto, and pertinents built or to be built upon the lands hereby set, in sufficient order and condition during the currency hereof; as also the whole fens of the same lands, and leave them all in a good tenantable condition at his removal; at least the said Thomas Lord Dundas obliges himself and his foresaids to leave buildings on the said lands at the end of the lease to the value of L.300 sterling, or to pay the proprietor at the end of the lease L.300 sterling, in his (the said Thomas Lord Dundas’) option.’ The pursuers are now in right both of Sir Archibald Edmonstone, and Mr Collins, the granter of the original tack and sub-tack. The defender maintains that he sufficiently implements the provision in the sub-tack to his ancestor, by leaving buildings on the ground of the value of L.300, or by payment of L.300. The Lord Ordinary (Ardmillan) sustained the defence, and the Court adhered.

ROBERTSON v. HUTCHINSON AND BROWN.—*March 18.*

Contract—Employment—Condition.

This was an advocacy from the Sheriff of Aberdeenshire. The pursuer was master of the ‘Pomona,’ a whaling vessel, in the summer of 1857. As that vessel was not to make any voyage till the ensuing spring, the pursuer accepted the command of a brig called the ‘Gem’ of Peterhead, which had been chartered by the defenders as a tender to carry provisions for their whaler, the ‘Traveller,’ which was bound for Cumberland Straits. The understanding was that the ‘Gem,’ on being relieved of her cargo, should return in the fall of the year. The defenders maintained that a verbal contract was entered into as to the pursuer’s wages, by which he was to be paid at a lower rate than that at which masters of vessels fishing alone are usually paid. The ‘Gem’ was detained with the ‘Traveller’ till the ice set in, and the pursuer thereby lost his command of the

'Pomona,' in which he was to be paid full master's wages. On the breaking up of the ice, the 'Traveller' was wrecked, and her master and crew were taken on board the 'Gem.' The fishing, which was thereafter conducted by the 'Gem,' proved very successful, the defender, it is said, making a profit of L.3000. The pursuer, on his return, claimed full master's wages on account of his having been detained longer than had been contemplated by the parties, and of the 'Gem' having been put to another use than that for which she was originally intended. The defenders adhered to the alleged agreement; and maintained, that in respect of it the pursuer was not entitled to benefit by the change of circumstances. The Sheriff and Sheriff-substitute decided against the pursuer, who advocated. The Court adhered, on the ground that the action was really one for implement of the agreement, and not for damages, the Lord President remarking that they were there to do justice between the parties, and not to compel the defenders to act handsomely.

LINDSAY, MILLER'S TRUSTEE v. SHIELD.—*March 19.*

Reduction—Bankruptcy Act, 1696, Cap. 5.

This was an action at the instance of Mr T. S. Lindsay, trustee on the sequestrated estate of John Miller, Springbank, Bonnington, for the purpose of reducing certain transactions between the bankrupt and John Shield, lately residing in Leith, formerly in the bankrupt's employment, on the ground that they constituted preferences contrary to the Act 1693, cap. 5, or were fraudulent at common law. The case was tried before a jury, who returned a verdict for the pursuer. The defender having moved for a new trial on the ground that the verdict was contrary to the evidence. The Court granted a new trial, and reserved all questions of expenses.

Pet., SMITH.—March 20.

Trust—Absent Trustee—Assumption.

This was a petition in regard to the administration of a marriage contract trust. The only surviving trustees are the husband, and a gentleman who has gone to Australia. The husband and wife lived separate. The trust-deed gives the last surviving trustee power to assume new trustees. The wife asks the appointment of a judicial factor, while the husband asks the removal of the absent trustee, in order that he may assume new trustees in terms of the deed. The Lord President and Lord Curriehill were of opinion that a judicial factor should be appointed. Lord Deas dissented. The trust-deed conferred discretionary powers on the trustees, but the Court could not confer them on a judicial factor. If they were to do so, they would virtually be making a will for the settlor. The factor could only act on powers given him by the Court; and it would be very inconvenient to have him constantly coming with applications for special powers.

RIGGS v. SIR J. W. DRUMMOND'S TRUSTEES.—*March 20.*

Property—Right of Way.

In July last a verdict of consent was returned in this case, establishing a public right of footpath along the left bank of the Esk from Roslin to

Bliston Burn. The parties agreed that the direction of the footpath should be generally that laid down in the Parliamentary plan prepared when Mountmarle and Dryden were sold, and referred the settlement of the other details to the Lord Advocate and Mr Young, the senior counsel in the case. The referees fixed the breadth of the footpath to be five feet; and that the path itself should be that delineated by Mr Wylie on the Parliamentary plan. On the motion of the pursuers, the Court applied the verdict, and found the defenders liable in expenses.

SECOND DIVISION.

CUTHILL AND OTHERS v. BURNS.—*March 20.*

Donation—Trust—Receipt.

In this action of count and reckoning, the main question in dispute related to L.6000, which was deposited in the Western Bank by the defender Mrs Burns and her husband, on a deposit-receipt, in the following terms:—‘Western Bank of Scotland, Glasgow, 20th May 1842.—L.6000 received from Mr and Mrs Burns—six thousand pounds sterling, payable to the longest liver, which is placed to their credit in the Western Bank of Scotland.’ Mr Burns subsequently died. The pursuers contended that the sum lodged in bank belonged to the husband, and that the terms of the deposit-receipt gave his wife no right to the money, but merely a title to uplift. Mrs Burns claimed the sum as being advanced out of the funds which she held exclusive of her husband’s *jus mariti*, and as an effectual donation to her, even if made out of his own funds.

The Lord Ordinary (Mackenzie) held the fund to belong to Mrs Burns. He thought that there were strong grounds for presuming that the L.6000 was chiefly made up of the funds which originally belonged to Mrs Burns under an exclusion of the *jus mariti*, although it might have included some of the husband’s savings; but that even supposing it could be held that the sum deposited in bank was originally the property of the husband, as the deposit-receipt was taken in the joint names of the spouses, and payable to the longest liver, the only inference deducible from the whole evidence was, that it was intended to be a gift to Mrs Burns in the event of her being the last survivor, and that the donation became irrevocable on her husband’s death. To this interlocutor the Court adhered; but only on the ground that the sum came from the wife’s estate.

THE LIQUIDATORS OF THE WESTERN BANK v. WILLIAM AND JAMES BAIRD.—*March 20.*

Relevancy—Delict—Abandonment of Action.

In this action against the Directors of the Western Bank, founded on fraud and gross negligence, the Court gave judgment, finding certain allegations relevant to go to trial. Of fifteen defenders who were parties to the record, thirteen had entered into a compromise with the pursuers, paying a sum of about L.200,000 for a discharge of the pursuers’ claim. In terms of the deed of agreement, these thirteen defenders were assolvied from the whole conclusions of the summons. On the other hand, the pursuers were careful, by the terms of this discharge, to limit its operation

to the parties with whom they were dealing, and to reserve right to prosecute this action against the two defenders who did not accede to the compromise. The Court had already, by more than one judgment, fixed that the present action was founded on joint delinquency, inferring a joint and several liability, or in other words, a liability *in solidum* against each defender; and they remained of opinion that the pursuers of such an action, by discharging several defenders, whether with or without consideration, did not thereby necessarily discharge the whole claim, nor debar themselves from enforcing that claim against others of the co-delinquents, each of whom was liable *in solidum*. The import of the judgment on the relevancy will appear from the following *proposed* interlocutor:—

Edinburgh, 21st March 1862.—The Lords, on the report of Lord Kinloch, Lord Ordinary, having resumed consideration of the closed record, with the proposed issues for the pursuers, and minute for the defenders William and James Baird, and answers thereto for the pursuers, dated 14th February 1862, and having heard counsel for the pursuers and for the said William and James Baird, the sole remaining defenders in the action: Find that in the record, as now restricted by the said minute of the 14th February 1862, it is relevantly averred that during the period from June 1853 to June 1856, the said James Baird, defender, and the other persons who were then in office with him for the time as directors of the Bank, were jointly guilty of gross negligence, by failing to perform the duties of the management entrusted to them, and leaving them to be performed by the manager, without any superintendence by the Board of Directors, or by any quorum, or any authorized committee thereof; by means of which negligence the manager was enabled to make, and did make, advances out of the funds, in violation of the contract of copartnery, to James Lee and Co., New York, to be employed in the prosecution of the business of the Bank in America, in consequence of which heavy losses were sustained by the bank: Find that in the record, restricted as aforesaid, it is relevantly averred that during the period from June 1847 to June 1852, the said William Baird, and other persons who were in office with him at the time as directors of the bank, were jointly guilty of gross negligence, by failing to perform the duties of the management entrusted to them, and leaving these duties to be performed by the manager, without any superintendence or control by the directors, or any quorum, or any authorized committee thereof, by means of which negligence the manager was enabled to make, and did make, advances out of the funds of the bank, by way of discounting bills to persons known to be unworthy of credit, by which great losses were sustained by the bank: Find that in the record, as restricted aforesaid, it is relevantly averred that during the period from June 1852 to June 1856 the defender, William Baird, and other persons who were then in office with him as directors, were jointly guilty of gross negligence by failing to perform the duties of the management entrusted to them, and leaving these duties to be performed by the manager, without any superintendence or control by the directors, or any quorum, or any authorized committee thereof, by means of which negligence the manager was enabled to make, and did make, advances from the funds to James Lee and Co., New York, to be employed in the prosecution of the business of the bank in America, in consequence of which

heavy losses were sustained by the bank. To the above extent and effect sustain the relevancy of the action, and of new appoint the pursuers to lodge draft of the issues which they now propose for trial. *Quoad ultra*, find the averments of the pursuer irrelevant, as grounds of action against the said William and James Baird, defenders, dismiss the action, and decern.'

The case having been continued to the 20th March, the pursuers put in a minute proposing to abandon the action, as permitted by the 10th section of the Judicature Act, 6 Geo IV., c. 120, to abandon the cause, on paying full expenses or costs to the defender.

The defenders admitted that the pursuers were entitled to abandon, except with reference to the questions of fraud, as to which the pursuers had put in a minute, passing from their allegations, and from which the defenders were entitled to absolvitor.

Per Curiam: The judgment of yesterday was not completed, and the case was in the roll to-day, for the Court to make up their minds what that judgment should be. The minute of abandonment tendered at this stage was therefore competent under the Judicature Act; and all that the Court determined was that the pursuers were within its 10th section. The Court would pronounce an interlocutor allowing abandonment under the statutory conditions.

HIGH COURT OF JUSTICIARY.

(Before Lords COWAN, ARDMILLAN, and NEAVES.)

Susp., SMITH v. PROCURATOR-FISCAL OF EDINBURGH.—*March 21.*

Time for Stating Objections to Relevancy.

The complainer, William Smith, was brought before the Sheriff of Edinburgh on 13th January last, on a charge of theft, or of breach of trust and embezzlement, alleged to have been committed by him when treasurer of the Grassmarket Male and Female Yearly Society, by appropriating money belonging to the Society or to its members, so stated. At that diet the Sheriff pronounced a judgment holding the libel relevant, and remitting the panel to an assize. The panel then pleaded not guilty, and the Sheriff appointed the trial to proceed at the second diet on 23d January. On the Sheriff asking the panel whether he pleaded guilty or not guilty, his counsel objected to the relevancy of the indictment. The Sheriff held that the libel had been found relevant at the former diet, and refused to allow any objection to be stated. The panel then pleaded guilty to breach of trust and embezzlement, and was sentenced to imprisonment for six months. Smith brought the present suspension, on the ground—(1.) That the Sheriff was wrong in refusing to hear his objections to the relevancy; and (2.) That the libel was irrelevant in so far as it described the money stolen as belonging to the Society or its members. The Society was not registered, and could not hold property; and it was not specified to what members of the Society the money belonged. This might depend on the rules of the Society.

The Court refused the suspension on both grounds.

Susp., FERGUSON v. THOW.—*March 21.*

Statute 4 Geo. IV., cap. 34—Imprisonment.

The complainer, Ferguson, a farm-servant, had been charged by his master, David Thow, farmer, Dirachie, with deserting his service, and was convicted and sentenced to fourteen days' imprisonment, under the Act 4 Geo. IV., c. 34. The present bill of suspension and liberation was brought on the ground that David Thow, the respondent, had been examined as a witness in support of his own complaint, and because he was the sole witness who proved the charge. The suspender, in supporting the bill to-day, further complained that the conviction was bad, because it gave imprisonment without hard labour; the statute only authorized imprisonment with hard labour. This objection had been sustained in two English cases.

Lord Neaves: You have an interest to complain of this, because the punishment was designed for your reformation, and the offence arose from your aversion to labour.

The respondent's counsel objected to the latter ground of suspension being now stated, as it was not mentioned in the bill, and he had got no notice of it.

Lord Cowan: When the objection is one that enters fundamentally into the legality of the conviction, we cannot refuse to entertain it. When it is once brought under our notice, we are bound to inquire into it.

The Court considered the question as to the competency of examining the petitioner as a witness so important, that they appointed the case to be heard before the whole Court. The other point was reserved.

Susp., M'CREADIE v. PROCURATOR-FISCAL OF GIRVAN.—*March 22.*

William M'Creadie, a grocer in Girvan, was, in 15th November 1861, convicted, before certain Justices of the county of Ayr sitting in petty sessions, of having had in his possession four iron weights, 'light, or otherwise unjust, in contravention of the Act 5 and 6 Will. IV., c. 63,' and was sentenced to pay the complainer the sum of L.2 sterling of modified penalty for said offence; and, in default of payment within fourteen days, he was decerned and adjudged to be imprisoned for the period of forty days, unless the foresaid sum should be sooner paid. M'Creadie brought the present bill of suspension *inter alia*, on the ground that the warrant of citation had been signed by one Justice only, while the Act required all proceedings under it to be with the concurrence of two Justices; and, because at the first diet, when he pleaded not guilty, and the case was adjourned, one of the three Justices on the bench was not qualified to sit, because he had not taken the oath of office.

The respondent objected to the competency of the suspension in this Court. The proceedings sought to be suspended were civil, and not criminal. On the merits there was no ground for suspending the sentence.

The Court held that the proceedings were criminal, and that the suspension was competent.

On the merits, the Court held—(1.) That the warrant of citation was competently signed by one Justice; (2.) That, as there was a quorum of Justices duly qualified at the diet when the adjournment took place, th

presence of the third Justice, even if it were ineffectual, could not invalidate the proceedings.

The bill was refused, with expenses.

APPEALS IN THE HOUSE OF LORDS.

THE ABERDEEN ARCTIC COMPANY *v.* SUTTER AND ANOTHER.—*March 27.*

Whale Fishing—Custom.

This was an appeal from a decision of the Court of Session in Scotland. The question involved was, Whether at Cumberland Sound, near Davis' Straits, the general custom of 'fast and loose,' prevalent over the whole of the Greenland fisheries, was applicable, or whether a peculiar mode of fishing, called 'drog fishing,' was exempt from its rules. The custom of 'fast and loose' was, that whenever a whale escaped from the control of the first harpooner, notwithstanding a float was attached to the end of the line, the fish was 'loose,' and became the property of any person who could secure it. The custom of 'drog fishing' alleged by the respondents to be exempted from the former rule, was, that whenever a line was attached to a whale, and thrown overboard, with several drogs or inflated seal-skins fastened to it, for the purpose of wearying the fish, no other person had a right to touch it while the original harpooners were continuing the pursuit. The Court of Session decided that 'drog fishing' was exempt from the custom of 'fast and loose,' and that the respondents, who had adopted that method, were entitled to the value of a whale which had been seized by the appellants, after the former had attached a drog to it.

The Lord Chancellor gave judgment in favour of the appellants, being of opinion that there was not sufficient evidence of the custom of 'drog fishing,' and that even if there were, it would be governed by the general custom of 'fast and loose' prevalent throughout the northern fisheries.

The other noble and learned lords concurred. The judgment of the Court below was reversed.

ENOCH AND OTHERS *v.* WYLIE AND OTHERS.—*March 27.*

This was an appeal from the Court of Chancery. It appeared that the late Sir James Wylie, physician to the Emperor of Russia, who, though a native of Scotland, was at the date of his will domiciled in Russia, executed a will, dated February the 12th, 1852, in the Russian language. He directed that certain specified legacies would be paid, and that the 'whole of my *capital* which shall remain with me after my death in ready money, and in bank billets belonging to me,' should be divided into ten parts, two of which were appropriated; and that the remainder, if not appropriated by any subsequent settlement, should be laid out, under the sanction of the Emperor of Russia, in 'the establishment of some public or charitable benefit which shall bear my name.' The question was whether this will disposed of the sum of L.67,897, standing at the time of his death in the Three per Cents. in England in his name, or whether he died intestate as to that sum. The testator died at St Petersburg in 1854, a bachelor, without having revoked or altered his will, or having made any other testamentary disposition. The respondents, as the heir-

at-law and next of kin, filed a bill praying to have it declared that the will did not affect any property not within the Empire of Russia, nor any property in Russia not specifically mentioned in the will. Vice-Chancellor Wood decided in favour of the respondents, when the present appeal was brought.

Their lordships affirmed the judgment, on the ground that the words descriptive of the property of which the testator disposed were not broad enough to carry money invested in the British funds.

English Cases.

LEGACY.—A testator, by will, gave a legacy to his son, who was a member of a co-partnership firm. The members of the firm were, after the death of the testator, adjudged bankrupt, and at the time of the bankruptcy the firm was indebted to the testator's estate. It was held, the assignees of the bankrupt partnership were not entitled to the legacy so long as the partnership debt remained due to the testator's estate. A testator, by will, dated in 1859, directed that his executors should, by and out of the monies to arise from the sale, calling in and converting into money of his personal estate and effects, pay his debts. It was held that such direction exonerated a mortgaged estate, devised by the testator to one of the executors, from the payment of the mortgage debt, the testator's personal estate being sufficient for the payment of all his debts, including the mortgage debt. *Stuart, V. C.* (on the first point): It seems to me that the principle which should govern the case is this, that the legatee should not be entitled to receive out of the testator's assets any part of the bounty intended for him by the testator, until he has acquitted himself of all obligations in the shape of debts which may be due from him to the testator. That principle was enunciated by Lord Cottenham in the case of *Cherry v. Bruttbee*, 4 Myl. and Cr. 442.—(*Smith v. Smith*, 31 L. J., Ch. Ca. 91.)

VENDOR AND PURCHASER.—Where unfair advantage was taken of the necessities of one who wished only to raise money upon mortgage, but was induced to execute an absolute conveyance at a considerable undervalue by his solicitor, who betrayed his interests to serve the purposes of the purchaser, the Court set aside the transaction as an absolute sale. *Stuart, V. C.*: Unfair advantage taken of the necessities and distress of one who wishes and intends only to be a borrower, but is induced to execute an absolute conveyance in consideration of a sum of money greatly below the value of the property, has been held enough to set aside the transaction as an absolute sale. The decisions of the House of Lords in *Fould v. Okeden*, 4 Br. Pl. 198, and *Kennet v. Hudson*, *ibid.* 222, and the principles stated by Lord Thurlow, in *Heathcote v. Paignon*, 2 Br. Cl. 167, sanction this view. And when, as in this case, one of the circumstances of unfairness is the employment by the alleged purchaser of no other solicitor in the transaction than that of the distressed person, who is betrayed into the execution of an absolute deed of sale instead of a mortgage, the right to relief is much stronger.—(*Douglass v. Culverwell*, 31 L. J., Ch. Ca. 65.)

WILL.—Testator, by his will, gave L.2000 to trustees, upon trust to pay the interest thereof to his daughter for her separate use for life, and after her death for her husband and children; and in case his daughter should not leave any children, then to assign and transfer such sum unto such person or persons as should happen to be the testator's next of kin, according to the Statute for the Distri-

bution of Intestates' Effects. The daughter survived the testator, and died without ever having been married; and it was held, the class of next of kin was to be ascertained at the death of the testator, and that they took as joint tenants. *Stuart, V. C.*: The reference by the testator to the Statute of Distribution was merely for the purpose of indicating the *class* who were to take. Had the gift been to those who would be entitled according to the statute, the case would have been different.—(*Re Trusts of Greenwood's Will*, 31 L. J., Ch. Ca. 119.)

ELECTORAL QUALIFICATION.—The minister of a dissenting congregation occupied premises which were vested in trustees, upon trust, *inter alia*, to permit the same to be occupied by the minister of the said congregation for the time being as his place of residence. The evidence before the revising barrister of the mode by which the minister was appointed was, that he undertook the duties of such minister for a probationary period of three months, in accordance with a request to that effect contained in a letter from three deacons of the congregation; and that at the expiration of that time he received verbally a call in general terms to become the minister of the congregation, which he accordingly did, and in that capacity had ever since occupied the premises. The proof of the appointment for life consisted of the minister's own statement, that he so considered it, and of the evidence of one of the deacons that the appointment was made in the usual mode, and, in his opinion, was for life. The revising barrister having decided that these facts did not, in law, amount to an appointment for life, the Court affirmed his decision, as the facts did not necessarily prove that such general appointment operated as an appointment for life.—(*Collier v. King*, 31 L. J., C. P. 80.)

ORDER OF REMOVAL.—The 4th section of 9 & 10 Vict., c. 66, which enacts that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the Justices granting the warrant shall state in it that they are satisfied that the sickness or accident will produce permanent disability, applies only to the sickness of the person to be removed. Where, therefore, a man, on account of his sickness, leaves his wife and children in one parish, and becomes an inmate of an hospital in another parish, and the wife and children become chargeable by reason of relief made necessary by such sickness, the case is not within the section; and it is not necessary that the order for the removal of the wife and children should state that the Justices were satisfied that the illness would produce permanent disability.—(*R. v. the Inhabitants of the Parish of St George, Middlesex*, 31 L. J., M. Ca. 85.)

EVIDENCE.—Declaration stated that defendant agreed to transfer a farm held by him under S. to plaintiff, upon the terms and conditions under which the same was held by defendant under S., and to sell the stock at a certain price, and a breach of that agreement. Defendant pleaded non-assumpsit, and a contemporaneous oral arrangement, that in the event of S. not consenting to the transfer, the above agreement was to be null and void, and that S. had refused his consent. The principal agreement was in writing, and plaintiff paid defendant L.100, a part of the consideration money, and sold with defendant's consent a small portion of the stock; but when S. refused his consent, defendant tendered back the L.100, which plaintiff refused to accept. Evidence of the contemporaneous oral arrangement was received, and rightly; for, under the circumstances, the inference of fact was that the oral arrangement was intended to suspend the written agreement and not as a defeasance of it. *Erle, C. J.*: 'The subject-matter of the two agreements is strong to show that the oral suspended the written agreement from the beginning, and was not in defeasance of it; for the written agreement was to assign, but the possibility of assigning was supposed to depend on Lord Sydney's consent, and the oral agreement that the written agreement should be void if he did not consent, is in its nature a condition precedent. The defendant, in effect, says, "If I have the power to act,

I will agree ; but if I have no power to act, I will make no agreement at all."'
—(*Wallis v. Littell*, 31 L. J., C. P. 100.)

WITNESS.—A witness, a party in the cause, about to be sworn, was objected to on the ground of want of religious belief. The Judge caused her to be sworn on the *voir dire*, and she was examined by the opposing counsel, and stated that she did not believe in the obligation of an oath any more than in that of her word, nor did she believe in a future state of rewards and punishments, but that she was morally bound, by the solemn declaration she had taken, to speak the truth. The Judge thereupon refused to admit her to be examined in the cause ; and it was held, the witness was properly rejected, that there was nothing irregular in the course pursued, and that the witness being sworn on the *voir dire* did not prevent her subsequent rejection.—(*Maden v. Catanach*, 31 L. J., Ex. 118.)

POSSESSION.—Plaintiff being indebted to A., entered into an agreement that certain goods should be held by A. as a security for the debt, and the agreement contained an acknowledgment that A. had received into his possession the goods which were the subject of the pledge. Part of the goods were, in fact, delivered to A., but a cart and one set of harness were by arrangement left in the possession of plaintiff. Shortly afterwards, upon A. getting into difficulties, plaintiff took back all the goods which were the subject of the pledge into his own possession ; but upon A.'s being declared bankrupt, his assignees seized the goods, and sold them for the benefit of A.'s creditors ; and it was held, in trover, by plaintiff, against the assignees, that there was a constructive delivery of all the goods into the possession of the pawnee. Willes, J.: 'The pawnee of a chattel has a right to sell it, although no special day be named for the performance of the obligation for which the pawn is a security, upon which it is agreed that the property of the pawnee shall become absolute.'—(*Martin v. Reid*, 31 L. J., C. P. 126.)

BARON AND FEME.—A husband, in a separation deed, covenanted with his wife's trustees, who indemnified him against her debts, that he would not compel or endeavour to compel her to cohabit or live with him by any legal proceedings, or otherwise howsoever. It was held, upon a bill filed by the wife and her trustees, that she was entitled to an injunction to restrain the husband from proceeding in a suit he had commenced in the Divorce and Matrimonial Court to obtain a restitution of conjugal rights, etc. The Lord Chancellor : 'It is well settled in courts of law that deeds of separation are good and valid. Mutual covenants by the husband and trustees of the wife, that neither shall sue the other for the restitution of conjugal rights, are properly and usually inserted in such deeds of separation. If such covenants were against the policy of the law, the deed of separation itself would be invalid and void ; but, on the contrary, it is settled that an action may be maintained on such covenants. In equity, the validity of deeds of separation is also established ; and, further, it has been decided by the House of Lords that an agreement to execute a deed of separation will be specifically performed, and that a covenant not to sue for restitution of conjugal rights is a proper constituent part of such a deed. . . . It is proved that the Court of Divorce, according to the interpretation which, rightly or wrongly, it has put on the statute creating it, will not recognise a deed of separation, or permit it to be pleaded in bar of a suit for restitution. Such was the rule of the Ecclesiastical Court, as is clearly shown by Sir William Scott in the case of *Mortimer v. Mortimer* ; but an action at law for damages for breach of the covenant not to sue for restitution is a most feeble and inadequate remedy ; and unless, therefore, the agreement involved in the covenant can be enforced in this Court by means of an injunction restraining its breach, it follows that a deed of separation, whatever may have been the consideration given for it, may be set aside and annulled at the pleasure of either party.'—(*Hunt v. Hunt*, 31 L. J., Ch. 161.)

LANDS CLAUSES CONSOLIDATION ACT.—A landowner having received notice from a railway company to treat for the sale of a part of his premises, does not, by offering to sell that part at a price named by him, preclude himself, if the company decline the offer, from requiring them to take the whole under the 92d section of the Lands Clauses Consolidation Act. Wood, V. C.: 'The whole object of the Act, as Sir R. Kindersley said in that case of *Giles v. The London, Chatham and Dover Railway Co.*, after minutely analyzing the views of the different judges who have had this sort of question before them, as to the effect of the notice to treat, is to put the parties in a condition to enter into a treaty and agreement. It may very well happen that an agreement may succeed; if it does, well and good. If it does not succeed, then compulsory process is requisite, and then, I apprehend, comes into operation the 92d section.'—(*Gardner v. the Charing Cross Railway Co.*, 31 L. J., Ch. 181.)

MASTER AND SERVANT.—An agreement in writing was entered into between W. and B., on behalf of himself and other parties, constituting the R. Company (limited), whereby W., in consideration of wages to be paid to him fortnightly by the company, agreed to serve the company exclusively as a collier from the date of the agreement until the expiration of any notice thereafter mentioned, and not to leave the service without giving twenty-eight days' notice, nor until after the expiration of such notice; and the company, in consideration of such faithful service, agreed that W. should not be discharged by them without twenty-eight days' notice. An information having been laid, under 4 Geo. 4, c. 34, s. 3, against W. by F., as agent of B. and his partners, alleging that he had contracted with B. and others, for absenting himself from the service without lawful excuse, on the hearing, the Justices held the variance immaterial by reason of 11 & 12 Vict., c. 43, s. 1, and adjudged W. guilty of the said offence, and committed him to prison for one month; and further adjudged (it having been proved before them) that no wages were then due to W., as he had been paid for all the work done up to that time, and the contract, as proved, being that W. was to be paid by piecework, no wages could be earned by him or would be payable during his imprisonment. It was held, the contract was not void for want of mutuality, as the employers were bound under it by implication to pay reasonable wages and to find work; and that the Justices were right as to the variance, and the conviction was good under 4 Geo. 4, c. 34, s. 3.—(*Whittle v. Frankland*, 31 L. J., M. Ca. 81.)

CRIME—Forum.—One who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county where the goods were obtained.—(*R. v. Stanbury*, 31 L. J., M. Ca. 88.)

SALE.—A receipt in the following form—'Received of J. D. and C. J., the trustees under the deed of settlement, for the benefit of my wife, the sum of L.93, 6s. 6d. for the purchase of my household goods and effects mentioned in the inclosed inventory and valuation as purchased this day by J. D. and C. J., as trustees named in the deed of settlement, and empowered to purchase by such deed'—is not a bill of sale within 17 & 18 Vict., c. 36. Bramwell, B.: 'I am clearly of opinion that this is not a bill of sale within the Act of Parliament. We cannot look at the mischief to be remedied by the Act of Parliament as the criterion, because the argument of mischief would apply to the case of a parol contract, under which one person may have the real possession, and another be entitled to the goods.'—(*Allsop v. Day*, 31 L. J., Ex. 105.)

LEGACY.—Testatrix directed her trustees to call in L.600, and after payment of debts to pay to her daughter Catherine L.75, and to her daughter Margaret L.75, and the residue to S. C., his executors or administrators, who should invest the same and pay the interest for the benefit of her grand-daughter until she should attain the age of seventeen, at which time the further sum of L.100 was to be paid to each of her daughters, and the residue to be invested.

and the interest paid for the benefit of the grand-daughter till twenty-one, when the same was to be appointed to her absolutely. Proceedings having been taken against the trustees, the L.600 was reduced by costs and expenses; and it was held, that the legacies to the daughters were not to abate, and the gift to the grand-daughter carried only so much as might happen to be the residue. Kindersley, V. C.: 'It is obvious that if a testator has power to dispose of a particular sum of money, say L.1000, and gives L.200, part thereof, to A., and L.200, further part thereof, to B., and the remaining L.600 to C., that is a gift of a definite sum to C.; but if, instead of that, there is a gift of the remainder to C., although it is called "the remainder," still, as in *Page v. Leapingwell*, the Court has held that the intention is to give a specified sum, which would be the amount of the residue; and why? because the conclusion is, that it was the testator's intention, to be collected from the whole will, to give the money in three definite portions; and, therefore, where, by reason of defalcation or other causes, there is a diminution of the fund, all three legatees must bear the loss proportionally.'—(*Harley v. Moon*, 31 L. J., C. 140.)

CONTRACT.—A contract was made, on the 9th of July, by the agents of A. and B., for the carriage of A.'s goods by B.'s vessel from London to Kustendjie, the shipment of which goods was to commence on the 1st of August. On the 21st of July B. denied the authority of his agent to make such contract, whereupon A.'s attornies gave B. a written formal notice that A. was ready to perform his part of the contract, and that he would hold B. responsible if he refused to perform his part. In reply to this, B. wrote, denying the existence of the contract, and tendering another contract for the acceptance of A. This was answered on the 24th of July by a letter from A.'s attornies, stating that A. declined to sign any other contract than the one concluded by the agents, and that he held B. responsible for the consequences. Between the said 24th of July and the 1st of August A. entered into a treaty with C. to take A.'s goods to Kustendjie in one of C.'s vessels; but the contract which was the result of such treaty was only finally concluded between A. and C. on the 2d of August, and on the 1st of August B. informed A. that he was ready to receive the goods on board his vessel. It was held, there had been an express renunciation of the contract by B.; and that, upon the above facts, A. was entitled to sue B. for not receiving the goods according to the contract. Also, that A. was not liable in a cross-action by B. for damages for not shipping the goods on board B.'s vessel; and that a plea, in such last action, of discharge by B. was proved by the above evidence of B.'s renunciation of the contract. Williams, J.: 'I think that the cases cited during the argument fully establish that, if before the time for the performance of the contract, one of the parties thereto expressly renounces it, the other party may at his option treat such renunciation as a breach of such contract, at all events, where he has acted thereon in such a way as to interfere with his performing the contract according to its original terms. I think the present case is within that rule. . . . Certainly the rule has been said to be qualified to this extent, that though a party has the option of treating a renunciation of the contract as a breach, he is bound to exercise such option; but here I think the company did exercise it, and there is, therefore, no difficulty in that respect.'—(*The Danube and Black Sea Rail. and Kustendjie Harb. Co. v. Xenos, et e contra*, 31 L. J., C. P. 84.)

POWER, FRAUD ON.—T. K. P., a tenant for life of an estate, had a power of appointment over it in favour of his children, or any one or more of them. No power of leasing was given to him. He had granted a lease to F., and the term became vested in G., and to the latter he agreed to grant a new lease for a term commensurate with the remainder of the old term. T. K. P. and his daughter executed a joint bond to indemnify G. against the determination of the lease by T. K. P.'s death before the end of the term, and on the same day T. K. P. executed his will, by which he made an appointment of the whole estate in favour of his daughter. Thereupon G. surrendered the old term, and

the lease was executed to him for the remainder of the original term. A son of T. K. P. filed a bill to set aside the transaction as being a corrupt bargain between T. K. P. and his daughter, and a fraud upon the power; but one of the Vice-Chancellors dismissed the bill with costs: and on appeal, it was held (affirming that decision), upon the evidence that the will formed no part of the arrangement with reference to the lease and the bond.—(*Pickles v. Pickles*, 31 L. J., C. 146.)

PAUPER LUNATIC.—For more than five years before the 23d of July 1856 the pauper lunatic had resided in the respondent parish with her father and mother. On that day her father died, and she continued, being unemancipated, to reside with her mother in the same parish till October 1858, when she was sent into the workhouse, where she remained until the 24th of January 1860. In December 1859 her mother removed from the respondent parish, and went to reside at C. On the 24th of January the pauper lunatic was sent from the workhouse to the County Lunatic Asylum, and was confined there until the 25th of April in that year, when she was discharged and sent to her mother in C. Her mother had acquired no settlement in her own right; and an order was made, adjudicating the pauper lunatic to be settled in the appellant parish, the place of her father's settlement, and ordering that parish to pay the expenses of maintenance, etc. It was held, the order was good, for that the mother had ceased to be irremovable by reason of her having left the respondent parish, and that the daughter had also ceased to be irremovable, as she was unemancipated, and still a member of her mother's family.—(*R. v. the Churchwardens and Overseers of St Mary Arches (Exeter)*, 31 J. L., M. Ca. 77.)

ARBITRATION.—Where an award is valid in form, and is made on all the matters referred, and on no more, and is intended by the arbitrators to express their decision, an objection that the arbitrators had made their award without exercising their own judgment, but according to the opinion of a third person by whose decision they had beforehand agreed to be bound, cannot be taken on a plea of nullity of the award to an action on the award, but ought to be raised on a motion to set the award aside—reversing the judgment below.—(*Whitmore v. Smith (Ex. Ch.)*, 31 L. J., Ex. 107.)

INDICTMENT.—Prisoner was indicted under 24 & 25 Vict., c. 96, s. 57, for breaking and entering a shop, with intent to commit a felony, viz., to steal. It was proved that prisoner broke in the roof, with intent to enter and steal, and was then disturbed; but there was no evidence that he ever entered the shop. A conviction for the misdemeanor of attempting to commit a felony was affirmed.—(*R. v. Bain*, 31 L. J., M. Ca. 88.)

PATENT.—The specification of a patent for improvements in embossing and finishing woven fabrics alleged the invention to consist in the use of rollers having any design grooved, fluted, engraved, milled, or otherwise indented upon them. The disclaimer which was afterwards filed, stated that the effect desired could only be produced by the use of a certain species of roller not particularly described in the specification, namely, a roller having circular grooves round its surface; and all other rollers were disclaimed. The Court held, that as the true invention resided entirely in the process described in the disclaimer, and as the specification did not describe or even suggest the form of roller that would effect the purpose, the specification was bad, and that the patent could not be supported. Wightman, J.: 'The invention, as described in the original specification, consists in the use of rollers having any design grooved, fluted, engraved, milled, or otherwise indented upon them. But it appears from the statements in the disclaimer that the effect desired can only be produced by the use of a certain species of roller not particularly described in the specification, namely, a roller having circular grooves, etc., round its surface, and all other rollers are expressly disclaimed. But, if the other rollers disclaimed will not succeed, and the special rollers are alone effectual, then the true invention resides entirely in the process described in the disclaimer, and

the original specification does not describe or even suggest the form of roller in which that invention consists; and this is by the disclaimer to extend the right granted by the patent.'—(*Ralston v. Smith* (Ex. Ch.), 31 L. J., C. P. 102.)

DAMAGES.—In an action for false imprisonment plaintiff tendered as evidence of special damage, that he had lost a situation which he should otherwise have got. Defendant imprisoned plaintiff at half-past one and detained him till past two o'clock. The evidence tendered was, that if he had appeared at a certain place at two o'clock he would have obtained a situation. When plaintiff got out of prison, he did not go to seek for the situation, but went home instead, and did not make any application till the following day, when it was too late. It was held, the damage was not the natural result of the unlawful act of the defendant, as it might not have happened at all if plaintiff had gone to seek for the situation as soon as he got out, or if the intended employer had not engaged another person.—(*Hoey v. Felton*, 31 L. J., C. P. 105.)

PUBLIC-HOUSE LICENCE.—S. agreed to take of M. the lease of a public-house upon condition that a retail licence should be obtained for him by M. On application being made by S. to the magistrates, a licence was granted in the ordinary form, but with an oral undertaking that the applicant would not sell spirits by retail to be consumed on the premises. On a bill filed by M. to enforce the specific performance, it was held (affirming the decision of the Master of the Rolls), that the bill must be dismissed. A 'retail licence' must be construed to mean the ordinary retail licence without any qualification.—(*Modlen v. Snowball*, 31 L. J., Ch. 44.)

LIBEL—Privilege.—R., a tradesman, received a letter purporting to come from the defendant, ordering a target to be sent to the head-quarters of a regiment of volunteers, of which the defendant was the honorary secretary and acting adjutant. In answer to inquiries from R., the defendant, in writing, denied that he had written the order for the target; and added, 'On comparison of the order and others with letters in the office, I have no hesitation in saying, as my firm opinion, that all the letters are in his handwriting; and, if you take proceedings, I am willing to state this on oath.' In an action for libel, the jury found that the defendant had written the letter to R., and others to the same purport, with *bona fides*, without malice, and believing the statements therein contained to be true; and that the plaintiff was not the writer of the order for the target to R., or of any other of the fictitious orders. Held that, on this finding, the defendant was entitled to a verdict in his favour, on the plea of not guilty.—(*Croft v. Stevens*, 31 L. J., Ex. 143.)

WILL.—Where a testator made a will in 1858, and destroyed it upon executing a second will in 1859, and afterwards made a codicil intending it to be supplementary to the will of 1859, but expressing it to be 'a codicil to my last will, made on the 30th of June 1858,' the Court granted probate of the will of 1859 and the codicil. There can be no revival of a will which has ceased to have both a physical and legal existence. *Quære*—First, whether a will can be revived which is no longer *in esse*. Secondly, whether evidence is admissible to explain the mistake, or supposed mistake of a testator.—(*Rogers v. Goodenough*, 31 L. J., Pr. 49.)

VENDOR AND PURCHASER.—The burthen of showing that a fair price has been given for the interest of an expectant heir lies upon the purchaser, and that burthen is not displaced by showing that substantial value has been given. A bachelor, aged fifty-nine, tenant for life, with remainder to his first and other sons in tail, purchased from his nephew, who was first presumptive tenant in tail, and under considerable pressure from his creditors, his expectant interest in the estate at an undervalue; and the two then cut off the entail, and conveyed the estate to the use of the purchaser in fee. It was held that this could not be looked upon as a family arrangement, and the purchase was set aside.—(*Talbot v. Staniforth*, 31 L. J., Ch. 197.)

PROBATE.—An illiterate testator appointed his widow and his son residuary legatees, and named them ‘whole and sole executrix.’ The Court inferred that his intention was to include them both, and made a joint grant of probate to them.—(*In the Goods of Court*, 31 L. J., Pr. 61.)

PROBATE.—A next-of-kin, who has been cognizant of, and privy to, a suit between the executors and another next-of-kin, was held to be bound by the decision in that suit, although he had not been cited to see proceedings, and had not intervened in the suit, so that he could not re-open the question of the validity of the will after its validity had been established in that suit.—(*Ratcliffe v. Barnes*, 31 L. J., Pr. 61.)

CARRIER.—A person who sends an article of a dangerous nature, to be carried by a carrier, is bound to take reasonable care that its dangerous nature should be communicated to the carrier and his servants who have to carry it; and if he does not do so, he is responsible for the consequences of the omission. Where, therefore, the defendant caused a carboy, containing nitric acid, to be delivered to the plaintiff, who was one of the servants of a carrier, in order that it might be carried by such carrier for the defendant; and the defendant did not take reasonable care to make the plaintiff aware that the acid was dangerous, but only informed him that it was an acid; and the plaintiff was burnt and injured by reason of the carboy bursting, which, in ignorance of its dangerous character, he was carrying on his back from the carrier’s cart,—it was *held* that the defendant was liable to the plaintiff in an action for damages for such injury.—(*Farrant v. Barnes*, 31 L. J., C. P. 137.)

WILL.—By a deed of arrangement, large real estates were vested in trustees upon trusts for sale, and payment of mortgages made by a husband, and subject thereto, to pay the income to the wife for life; and an absolute power was reserved to her to appoint by deed or will, not only the surplus income, but also the real estates themselves. The husband subsequently deserted the wife, leaving her in possession of the estates, one of which was reserved for her occupation, free of rent, so long as the interest on the mortgages was paid. The husband afterwards went to live with another woman; and, after a lapse of years, the wife, by collusion with her husband, induced him to go to Scotland and commit adultery, to afford her an opportunity of obtaining a divorce there. During the negotiations, she made her will, and appointed the estates, together with the proceeds and income thereof, to P., a Frenchman, whom she knew before her marriage, his heirs and assigns. She obtained the divorce, and afterwards executed two deeds appointing the estates to P., his heirs and assigns, and then went through the ceremony of marriage with P. in Scotland and France. After her death, upon a suit by P., and upon another suit by a creditor of the husband, who had become insolvent, the one to carry the deeds into effect, and the other to impeach the appointment both by deed and will, *held*, on P. submitting to carry out the trusts of the will, that the will was not revoked by the deeds, as they contained no declaration to that effect; that the omission to revoke the will rendered it unnecessary to decide whether the deeds could have been carried into effect; that the appointment made by the will was good, and that the trusts ought to be carried into effect; and the cross-bill to impeach the appointments was dismissed, with costs.—(*De Pontès v. Kendall*; *Ford v. De Pontès*, 31 L. J., Ch. 185.)

ARREST.—An insolvent debtor is privileged from arrest when attending or returning from the Court in which his petition is heard, although on the day he was arrested the consideration of the final order was adjourned *sine die*. *Crompton, J.*: We must hold that the Insolvent Court is a court of justice, and that the same privilege exists for a party attending that Court as for a party attending any other court of justice; and it is no argument to say, that the Commissioner has refused protection to the insolvent. He is not made an outlaw, so as to be disentitled to that privilege which is given by the law.—(*Chauvin v. Alexandre*, 31 L. J., Q. B. 79.)

LEGACY.—By a will, specific and pecuniary legacies were given to several legatees by name, and testator gave all the residue of his personal estate to all the before-mentioned pecuniary legatees, with certain exceptions, to be divided between them in proportion to their respective pecuniary legacies. By a codicil, after reciting the death of one of the pecuniary legatees, testator bequeathed the legacy given to her by the will to J. B. *Held*, that there was an intestacy as to the share of the residue given by the will to the deceased legatee. Wood, V. C. : It was true this Court would assume that the testator did not wish to die intestate ; but it was constantly obliged to hold that he had done so. The testator had clearly had all the circumstances present to his mind. He had given the L.500 and the L.200, and had said nothing about the residue. He must be taken as knowing that he had given that residue among the legatees personally. The result was, there was an intestacy as to this share of the residue, and the next-of-kin were entitled. With regard to the costs, his Honour referred to *Re More's Trusts* 10 Hare 171, and directed the costs of all parties to come out of the fund.—(*Re Gibson's Trusts*, 31 L. J., Ch. 231.)

PERJURY.—On the hearing of an application for an order of affiliation against H., in respect of a full-grown bastard child born in March, the mother, in answer to questions put to her in cross-examination, denied having had carnal connection with G. in the September previous to the birth. G. was called to contradict her ; the Justices admitted his evidence, and he wilfully and falsely swore that he had had carnal connection with her at the time specified. It was held by eleven of the judges (Crompton, J., and Martin, B., dissenting), that, although the evidence of G. ought not to have been admitted to contradict the mother on a matter which went only to her credit, still, as it was admitted, it was evidence material to her credit ; and, consequently, so far material in the inquiry before the Justices as to be capable of being made the subject of an indictment against G. for perjury. Cockburn, C. J. : Here the evidence having been admitted, and having reference to a matter pertinent to the inquiry, *The Queen v. Philpotts* is a direct and distinct authority that perjury may be assigned upon the answer. I go along entirely with the principle of that case, that if a witness is allowed to give evidence, though it may afterwards turn out that his testimony ought not to have been admitted, perjury may, nevertheless, be assigned upon his answer. It does not lie in the witness' mouth to say that his evidence was immaterial, especially when, if believed, it might most seriously have injured the party against whom it was given.—(*R. v. Gibbons*, 31 L. J., M. Ca. 98.)

FREIGHT.—On a guarantie that a certain vessel should sail with or before any other vessel then in the berth, 'under penalty of forfeiting one-half of the freight,' another vessel having sailed first, it was *held* that 'one-half of the freight' could be recovered as liquidated damages ; and also that it was immaterial whether the money intended to be made payable was called by the parties 'a penalty' or 'liquidated damages.' Bramwell, B. : The question is, Is this a sum of money recoverable ? Is it, as popularly expressed, a penalty or liquidated damages ? We think that it is recoverable, and that whether we seek a solution of the question in the statute 8 and 9 Will. III., c. 11, or elsewhere. It is not a sum to secure the performance of several matters. This is the distinction on which the question turns : the names the parties give the money, 'penalty,' or 'liquidated damages,' are immaterial.—(*Sparrow v. Paris*, 31 L. J., Ex. 137.)

GAME.—If rabbits be started and killed on the land of another, they are the property of the person on whose land they are killed, and not of the captor. *Quære*—Whether there would be any difference if the rabbits were started on the land of A. and killed on the land of B. Willes, J. : It will be well, when this case is further considered, if it should ever be so, to compare the dictum of Lord Holt, in *Sutton v. Moody*, with the same passage in the *Institutes of Justinian*, where it is laid down that wild animals 'simul atque ab aliquo capta fuerint jure gentium statim illius esse incipiunt ; quod enim ante nullius est, id

naturali ratione occupanti conceditur. Nec interest feras bestias et volucres utrum in suo fundo quisque capiat an in alieno. (Lib. ii. l. 12.)—(*Blades v. Higgs*, 31 L. J., C. P. 151.)

LIBEL.—Though a publication of the report of a trial in a court of justice, in the course of which a libel is read, would be privileged; a publication of the proceedings of a parish vestry, at which a libel is read, is not so privileged. *Wilde, B.*: Undoubtedly, the report of a trial in a court of justice, in which this document had been read, would not make the publisher thereof liable to an action for libel; and reasonably, for such reports only extend that publicity which is so important a feature in the administration of the law of England, and thus enable to be witnesses of it, not only the few whom the Court can hold, but the thousands who can read the reports. But no court has decided that the reports of what takes place at a meeting of such a body as this vestry, are so privileged. . . . It was further contended that this libel might be justified as matter of public discussion on a subject of public interest. The answer is: this is not discussion or comment, it is a statement of a fact. To charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated. There the writer may, by his opinion, libel himself rather than the subject of his remarks.—(*Popham v. Pickburn*, 31 L. J., Ex. 183.)

POWER OF APPOINTMENT.—A settlement made in 1794, gave to A. E. a power to appoint the fee by deed or will. By deed, in 1830, she exercised this power of appointment, but reserved to herself power of revocation and new appointment by deed. In 1833, by another deed, she revoked that of 1830, made a new appointment, and repeated the same reservations. She did the like by another deed, in 1835. In 1836 she executed another deed, revoking the uses of 1835, but not making any new appointment, nor making any reservation as to the power of new appointment. In 1848 she made a new appointment by will; and it was held by the House of Lords, affirming the decree of the Lords Justices, and overruling a previous decision of Vice-Chancellor Kindersley, that the original power of 1794 was not exhausted by the deeds of 1830, 1833, 1835, and 1836, but that, under the original power, it was still competent to A. E. to appoint by will. *Lord St Leonards*: Here the revocation had been well executed; it was not a clumsy revocation of all previous deeds, but a clear single revocation of the last deed: for, in truth, each of the deeds had revoked its immediate predecessor, and, therefore, the simple revocation of the last of them left matters as if no deed had ever been executed. Then came the will. If the power to appoint by will, in the original settlement, remained untouched, what was the position of the testatrix when she had revoked the last appointment? She had just the same power to appoint by deed or will with which she had started in 1794. As regarded intention, that could have no effect here, except as shown by the operation of the deeds.—(*Saunders v. Evans*, 31 L. J., Ch. 233.)

NEGLIGENCE.—The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plaintiff must give some affirmative evidence of negligence on the part of the defendant. Where, therefore, it was shown that the defendant was riding a horse at a walk, when the animal became restive, and, rushing on to the pavement, knocked down and killed the husband of the plaintiff; but the witnesses for the plaintiff also proved that the defendant was doing his best to prevent the accident,—*held*, that this was no evidence of negligence; that, taking the evidence of the witnesses for the plaintiff altogether, it was clear that the defendant was carried on to the pavement against his will, and that there was therefore nothing to turn the scale of evidence against the defendant, and to show that he was responsible for the consequences of the accident.—(*Hammack v. White*, 31 L. J., C. P. 129.)

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REPRESENTATIVE RESPONSIBILITY.

THE general principle of responsibility is, that the duty of repairing the consequences of a wrong is strictly personal to the wrongdoer himself. Culpa has its seat in the mind; therefore, *culpa tenet suos auctores*. That was a fundamental maxim of the Roman law, from which it has been transplanted into our own; and, so far as delicts are concerned, is incapable of exception.

As regards acts of negligence, however, or quasi delicts, the rule must be obviously subject to some modification. The duty imposed on every person so to conduct his affairs as not to injure another, necessarily includes things done by his agents or servants, as well as by himself; for when a wrong is suffered, it is immaterial to the person injured whether it is done by the principal himself, or through the agency of another. He is free to employ any one he thinks proper; and a prudent man engages only careful, intelligent, and skilful persons. It may be said, indeed, that the fact of their being in his service is a warranty to all the world that they are competent for the duties with which they are entrusted. ‘*Qui enim aliquem proponit is clara et aperta voce dicere videtur hunc ego proposui—qui volet cum eo contrahat*’ (*Peckius in leg. 5 D. de exercit. Act.*). It is further open to the master to give them only such instructions as may be safely carried out; to hold over them such superintendence, and to take such precautions, as will secure that the mode in which his business is conducted shall be without prejudice to the public. These considerations have led to the recognition of the principle, *qui facit per alium facit per se*. For a wrong done by a servant in

the course of his employment, and acting within the scope of his authority, the master is bound to answer ; because, in contemplation of law, the wrongful act of the servant is simply the act of the master himself.

The principle is entirely the development of modern times, and is not found in the Roman law. A slave being a mere chattel, was not answerable for his own delict,—*servus nil deliquit qui domine jubente obtemperavit*;—but the wrong was treated as the personal act of the master, for which, accordingly, when it was committed under his orders, he himself was responsible. It is said, for instance, ‘*si servus sciente domine accidit in solidum dominum obligat ; ipse enim videtur dominus accedisse*’ (L. 2, Pr. D. *de Noxal. Act.*). By the knowledge of the master we are to understand a wilful sufferance or non-prohibition of the act in question. ‘*Scientiam hic pro patientia accipimus ;*’ ‘*cum prohibere posset non prohibuit.*’ Therefore, when it appeared that the master knew of the wrong done, and could have stopped its commission, but failed to do so, he was liable to be sued for the consequences as the direct cause of the injury. In other words, he was treated as art and part. But this has no relation to the representative responsibility of an employer, such as that under consideration. In such circumstances, the party injured by a slave was, by the ancient law of Rome, without redress ; and so it was found necessary to invent a new form of process, under which the master was sued *servi nomine*. This was termed the *Actio Noxalis*—*noxa* or *noxia* signifying the delict of a man *in potestate*. The person liable to be sued was the actual owner or possessor at the time—*noxa caput sequitur*. If he chose not to defend the action, he was required to transfer the slave in property to another. If he chose to defend him, and the slave was found guilty, he was condemned *cum noxæ deditiōe*. The master’s responsibility was thus in no sense a representative liability ; for in any case he could judge for himself whether it would be most to his advantage to pay the damage suffered, or to give to the complainer the slave who was thereby made to indemnify his own wrong to the extent to which he was actually worth.

The rule by which we now hold an employer to be answerable for the negligence of his servant or workman, will, in the general case, be found to involve—

(1.) That between the wrongdoer and the person sought to be charged, there existed the relation of master and servant.

(2.) That the act complained of was done in the course of the servant's employment, and within the limits of his authority.

A master is a person whose orders a servant is bound to receive and obey; who pays him his wages; and who can dismiss him for misconduct. The rule of law applies not only to domestic servants, such as a butler, coachman, groom, gardener, or house-maid, but to persons charged with the superintendence of any piece of business, such as a shopman or clerk, the keeper of the signals on a railway, or the driver of a locomotive. It is obviously of no moment whether the servant be appointed directly by the master himself, or through the agency of another deputed for the purpose—such as a foreman or manager. The owner of a ship appoints the master, and the master selects his crew. The crew thus become the servants of the owner for the government of the ship; and if any damage happens by their default, it is the same as if it happened through the immediate default of the owner himself. So in the case of a mine, a farm, or a manufactory;—the workmen are hired by the manager; but it is the proprietors who get the benefit of their services, and from them that they receive their wages; therefore the workmen represent the masters, and their acts stand on the same footing as their own.

In considering the distinguishing marks by which the relation of master and servant may always be recognised, it is necessary to remember that the right of the master to hold the servant subject to his disposition and control arises under a contract of hiring—*locatio operarum*,—the hire of a person's services in a given character for a given period,—not *locatio operis faciendi*, the engagement of a tradesman to do a particular piece of work for a given sum. The right of the servant to represent his employer in the particular matter for which he is engaged, flows from an implied mandate. The relation is thus dependent primarily on the contract of hiring, but partly also on the contract of mandate. Properly speaking, therefore, the rule applies only to agency of a strictly domestic or administrative kind, such as that of an *institor qui tabernæ locove ad emendum vendendumve præponitur* (L. 18 D., *de Inst. Act.*); but on considerations of public expediency, it has been extended to a much wider circle of cases. A client is answerable for the blunder of his law agent; a creditor for the mistake of a messenger, and so on. But, these relations excepted, it will generally be found that to establish responsibility for the act of another requires the concurrence of two con-

ditions, the absence of either of which will be fatal to the master's responsibility :—

1. That the agent or servant has been voluntarily and freely chosen by the master, or his deputy duly authorized.

2. That the master has the right to give instructions and orders as to the thing to be done, and the mode of doing it; that is to say, that the servant is subject to the master's absolute disposition and control.

For example, if a tradesman is instructed to execute certain repairs on a moveable subject, he is no doubt voluntarily selected from among many of the same class; but it would be preposterous to say that he is bound to follow the instructions of his employer as to the mode in which the work is to be done. For a work requiring the experience of a particular craft, the employer has done his duty by selecting a person reputed skilful and trustworthy. The tradesman must necessarily be allowed to take his own way, both as to the instruments he employs and the purposes to which they are applied. If an accident happens by the fault of himself or his workmen, it is he alone that must bear the consequences. Again, if the work is to be done by way of contract, the like latitude must be left to the contractor, to adopt the plan which he may deem most profitable to himself or best in the circumstances. He may see it to be his interest to enter into a sub-contract. In either case, the work is placed beyond the control of the employer, and he is in no way answerable for the negligence of his contractor or the persons under him.

Thus, A., the proprietor of a house in Princes Street, Edinburgh, contracted with B. for the execution of certain alterations; and B. made a sub-contract with C. to do the plaster work. A portion of the street was fenced off for the use of the workmen and the deposit of the material, under warrant from the proper authority; but C. deposited a quantity of lime at the end of the erection without taking any of the precautions against accidents provided by the Police Act. A cabman, who drove against this heap of lime, was overturned and killed on the spot. His widow concluded against all three, A., B., and C., jointly and severally, for L.600 of damages. The proprietor of the house pleaded that the operations were of an innocent and ordinary character, and had been entrusted to competent and skilful contractors, for whom they could not be responsible, because a master has no control over a contractor; still less when

the damage is done by a sub-contractor. The contractor B. pleaded that the fault was not his; that in his part of the operations he had taken all proper precautions; and that he could not be held answerable for the acts of his sub-contractor, who was in no sense a servant of his. The Court gave effect to this contention, holding that the proprietor of a house *bona fide* employing tradesmen to execute repairs on it, was not accountable for everything done by the contractors, and was not bound to watch over everything they do. The party held liable in damages was therefore C., the wrongdoer, and the two others were assoilzied (*M'Lean v. Russell*, 12 D. 887, 3 Ross L. C. C. 281).

It has been truly said, that the difficulty of this branch of the law consists not in the doctrine itself, but in its application. Much must depend on the circumstances, as they come out in each individual case. Suppose, for example, a public company contracts for the execution of the works forming their undertaking to the satisfaction, and possibly subject to the directions, of an inspector or engineer appointed by themselves: is the company liable for the fault of the contractor or his workmen? We have here the second of the two elements above mentioned as conclusive for the existence of the relation, but not the first. The company do not appoint the men, but have the sort of negative control involved in the right to prevent them from working otherwise than they shall determine. It is thought, therefore, with no other facts in the case, their responsibility might be satisfactorily questioned. If, however, they reserved the power of dismissing any of the contractor's workmen for incompetence, the fact would make an important difference. In a contract of this nature, it was held that the company were liable for the negligence of the contractor's workmen in allowing a stone to fall from a bridge being constructed over a highway, whereby a person was killed (*Reedie v. L. & N. W. Ry.*, 4 Exch. 244). In a case of this complicated description, the question to be looked to is, whether in substance the work is being done by the party himself or by a stranger. For example: The owners of a bonded warehouse employed a master porter for the purpose of lowering some barrels of flour from their warehouse to a cart. He brought men and tackle of his own; and one of the barrels having slipped and fallen upon a person below, it was held that the owners were responsible for the injury. In this case, it will be seen, the men, though brought by the master porter, were in effect in the service of the owners of the

warehouse, being both working in their premises and subject to their orders. It was not the case of a tradesman, such as a mason, carpenter, or slater, exercising an independent calling, and called in to do a thing which nobody is expected to do for himself, because properly falling within a trade different from his own, and of which possibly he knows nothing. It was the case of a workman called in to perform a subordinate part of the employer's own business, on his own premises, and subject to his own immediate superintendence; and therefore the employer was properly held to be directly liable for the injury.

But the rule, that no one is answerable for any acts other than those of himself and his servant, is subject to certain modifications when the injury results from the condition of fixed property, such as lands or houses, or operations upon them negligently conducted. Every proprietor is bound to see that his property is so kept as not to be productive of damage to his neighbours (*Cleghorn's Trustees*, 18 D.),—an obligation not resting on the principle of *respondeat superior*, but arising simply from the fact that the property is his—that the use of it is confined solely to himself, and that, as every one is bound *sic utere suo ut alienum non lædas*, it may be naturally and reasonably expected of him to take care that no one, be they servants, contractors, or strangers, should be permitted to come on his premises, and do anything therewith likely to cause damage to another. Thus in the case of *Bush v. Steinman* (B. & P. 404), the owner of a house had employed a surveyor to do some work on it. There were several sub-contracts; and one of the workmen of the person last employed put some lime on the road, in consequence of which the carriage of the plaintiff was overturned. It was held that the owner of the house was liable, though the person who did the wrong was not his servant. (So also *Sly v. Edgely*, 6 Esp. 6; *Randelson v. Murray*.) Injuries of this kind, it has been said (*Quarman v. Burnett*), are of the nature of nuisances; but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are entrusted to the care and management of others who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to trust them.

In the case of *Nisbet v. Dixon* (14 D. 973, 9 D. 1048), it appeared

that the pursuer was proprietor of certain lands containing coal and iron-stone ; and the coal was let to one tenant, and the iron-stone to the defenders. The defenders had an agreement with two persons, named Nimmo and Watson, who became bound, in consideration of being paid so much a ton, to provide men for putting out the iron-stone and for calcining it on the surface, agreeably to the instructions of the defenders' overseer ; to pay the men's wages ; and to furnish various implements for the workings. The contractors negligently set fire to a quantity of iron-stone for the purpose of calcining it, and the fire was communicated to the coal lying between the surface and the iron-stone. The proprietor brought an action against the defenders, as tenants of the iron-stone, to recover the cost of extinguishing the fire in the colliery. The jury found that the fire was communicated to the coal through the fault of the contractor Watson ; and on the question, whether the tenants were liable for the latter's negligence, it was held that they were. ' This is not like a contract,' said the Lord President, ' to produce one complete thing, such as to build a house or a ship. It is not like a contract in which there is one price to be paid, and one thing to be completed. In substance, it is a contract of service ; the contractors were to furnish sleepers and some other things ; but it was at least a mixed transaction, partaking mainly of the nature of service. It was not a matter which could be brought under any distinct trade or calling, apart from the labour bestowed on it. The nearest thing to it is a contract to make part of a railway. That is a contract for the employment of labourers ; but it is a contract to make a single piece of work. This was a contract to take out the iron-stone and to calcine it.' These, however, rather appear to be considerations which scarcely affect the question. It was virtually an undertaking to do a particular piece of work by contract. It was the same as if a person had contracted to thrash a farmer's grain. If the work was done on a neighbouring farm, it can hardly be said that the owner of the grain would be liable for the contractor's negligence. If a man leases a piece of ground for building, he is not answerable for the negligent way in which the house is built. That is just what the defenders were allowed to do under their contract with the landlord. It was not necessarily to do it with their own hands, nor necessarily by the hands of people employed on day's wages. But could they, by employing contractors of this sort, get rid of the responsibilities to the landlord ? Perhaps they might, if they had been dealing with

a moveable subject ; but tenants of an heritable subject, under a mutual contract between them and the landlord, are, as we have seen, liable for the negligence and unskilfulness, not only of the men they employ at so much a day, but for the men acting under a person who has made a special contract. In the case cited, a more satisfactory ground of judgment was, that in the agreement there was a specific right given to the defenders' overseer to superintend the contractor ; and if, as was said by Lord Cuninghame, he failed in his duty, or was too ignorant to control what was necessary, the defenders were liable for his gross mistake. The case is thus distinguishable from the case of *M'Lean v. Russell* ; for there the sub-contractor was following out a well-known and recognised occupation ; and the fault for which he was to blame, was distinct altogether from any use to which the property might have been put. The damage was not done to a neighbour's house, but to a passer-by. But perhaps the case cited would have had the same result if the contractor, by an arrangement of his own with a neighbouring proprietor, had carried on the process of calcining on a different estate.

2. The relation of master and servant being established, the next condition on which the master's responsibility depends, consists in the act complained of being done in the exercise of the servant's proper functions, or within the terms of his mandate, express or presumed. A person hiring himself to another, of full age, and capable of directing his own conduct, is only subject to such orders of his employer as are not inconsistent with the contract which either of them has freely and voluntarily formed. Except in the particular line of business for which he has been engaged, the master can exercise over his servant no legal control. Beyond these limits, the one may be charged as aider and abettor of the other, on evidence sufficient to show that the two were art and part in the wrong complained of. But this kind of responsibility is in no way connected with the species under consideration. We are speaking of the case in which the master is held accountable for the negligence of his servant, on the ground that the latter was the mere hand of his master in the doing of it. Plainly he cannot be responsible for the acts of his servant outwith the particular duty confided to him, expressly or by the terms of his general employment.

When we engage a person as groom, coachman, steward, or gardener, we tacitly give him all the directions requisite and necessary for the proper discharge of his duty. By implication we say to him,

You must always keep perfectly sober, carefully and cautiously conduct yourself, so as to do no harm to any one else. If, however, in a forgetful moment the coachman gets drunk, and manages the horses in such a way as to run down some one on the street, it is obviously not for us to say, that we were not in the carriage at the time; or that we had given express orders to the man to drive with great caution; or that, supposing we had been willing, we could have done nothing to prevent the catastrophe that actually happened. The law holds that we had no right to have in our service a person who was unfit to discharge the duties in which he was employed; and a wrong done by him is exactly the same as if it had been done by ourselves. The only answer which he can competently make, is to show that the wrong was done outwith his proper functions. 'There are frequently cases,' says Lord Ivory, 'in this branch of the law which are attended with difficulty. I remember a case which was laid before our late friend Mr Jameson as arbiter. The servant of a lady residing in a cottage in the country thought proper to clean the kitchen chimney by sending up lighted straw. The cottage was burnt to the ground; and the question was, whether the mistress of the servant was liable to the landlord for the destruction of his property. The distinction taken by Mr Jameson was this—If the servant had accidentally set the chimney on fire by letting some of the dripping fall on the lighted coals, she would have been within her own proper employment as cook, and so her mistress would have been held liable. But as she could not be held to have been hired for sweeping her mistress's chimney, she was beyond the limits of her functions, and therefore the mistress was held not liable' (*Baird v. Graham*, 14 D. 615). A decision to the same effect was given in the English case of *Mackenzie v. M'Leod*, 10 Bing. 285, where a cook set fire to the house in a similar way.

As a general rule, great latitude is taken by the Court in construing what is being engaged in another's employ. It comprehends whatever is done in the course of his employment, *eundo, morando, et redeundo* (*Marshall v. Omoa and Cleland Iron Coal Co.*, H. 137); and may even be held to embrace a deviation or excess of duty to a certain limited extent. But 'if the master is liable where the servant has deviated, it must be where the deviation occurs on a journey on which the servant has started in his master's business; in other words, he must be in the employ of his master at the time

of committing the grievance' (Jervis, C. J., in *Mitchell v. Crasweller*, 13 C. B. 237). This, however, cannot be said of one who goes out of the way of his duty altogether, not for the promotion of his master's interest, but for some purpose of his own. In a case of this kind, it appeared that defendant's servant had been sent with goods in a cart to the city; and in returning, to oblige a friend, agreed to give him a drive home. He went out of his way to do so, and ran down plaintiff's wife, for which action was raised against his employer. But the Court held that a master was not liable for a negligent servant when not engaged on his master's business; that it was his duty, in returning from the city, to take the horses direct to the stable; and the defendant, not having given him permission to go where he did, was not liable (*Mitchell v. Crasweller*, 20 L. J. 237).

But while such is the nature of the responsibility imposed on principals and employers towards third parties in respect of the acts of their agents and servants, it by no means follows that they should be bound to indemnify the agents themselves against all the perils with which the service on which they are engaged may possibly be attended. . It is the duty of the master to supply his workmen with good and safe tools and materials, and to see that none but skilled workmen are taken into his employment. But beyond this, his obligation, it has been decided, cannot reasonably be expected to extend. He cannot be held accountable for every hurt which may be occasioned to a workman by the necessary use of the instruments peculiar to his craft. Liability to such accidents is a necessary accompaniment of the particular business for which the workman professes himself to be qualified; and it may reasonably be supposed that such liability, to an extent proportioned to the perilous nature of the occupation, was one of the elements taken by both parties into account in fixing the wages to be paid. For accidents, therefore, sustained by the workman in pursuance of an employment conducted with all proper precautions for the men's safety, he has no recourse against his employer. If of his own accord he engages in a dangerous occupation, he must be held to undertake at the same time that he will trust for protection to his own skill, courage, and intelligence. Whether the same consideration should exempt the master from all liability for the damage suffered by one of his workmen through the fault of a fellow-workman, was an abstract question more difficult to determine. The law of France declares that a workman injured in this manner is to be treated in the same

way as any other member of the public ; and that the fact that the master happens to be paying him wages at the time, forms no exception to the rule that he is liable for every act of imprudence or negligence of which his workmen are guilty. It was at first decided that the law of Scotland was to a similar effect ; but after much controversy it has been finally settled by the House of Lords, that there is no reason why the law of Scotland should be different from that of England in this particular, and that the contrary view, taken by the English Courts, was the sounder of the two. The view adopted in England was simply this, that when a person hires himself as one of several workmen, a chance act of imprudence or want of skill on the part of a fellow-workman is one of the risks which he takes upon himself, and against the occurrence of which it is no part of the master's undertaking to furnish him with any guarantee. 'Put the case (says the English Court of Exchequer) of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted that if, by the unskilfulness of A., a stranger is injured, the master is responsible. Not so if A., by his unskilfulness, hurts himself. He cannot treat that as the want of skill of his master. Suppose, then, that by the unskilfulness of A., B., the other servant, is injured while they are jointly engaged in the same service. There B. has no claim against the master. They are both engaged in a common service, the duties of which impose a certain risk on each of them ; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant ; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk' (*Huchinson v. York, Newcastle, and Berwick Ry.*, 5 Exch. 351). The reason on which a master is liable to one of the public for an injury caused by one of his workmen, does not apply to such a case. The party injured is entitled to say—'I am a stranger to you. I do not know whether you or your servant is to blame. I have nothing to do with the operations which you are now carrying on ; and you must indemnify me for the wrong I have suffered.'

But while a servant is required to consider his liability to an injury by the carelessness of his fellow-workmen as one of the acci-

dents of his employment, the risks of which he has assumed in contracting with his employer, he is equally entitled to expect that the master, on his side, will do his duty towards him, by taking all proper means to protect him as far as possible from unnecessary danger. He has a right to expect that he will be associated with none but persons who are capable, safe, and trustworthy. The employer, of course, cannot be expected to warrant the competency of every one in his service ; but he is responsible for the consequences of an accident wherever there has been actual fault or negligence on his part, either in the act from which the injury arose, or in the selection and employment of the agent which caused the injury. If, for instance, a contractor, in laying down water-pipes several feet in diameter, causes them to be placed so near the edge of the trench, that they fall over on a workman working below, he is answerable for an act the danger of which would have at once occurred to any intelligent observer (*Edward v. Peters*, 33 S. J. 119). So with machinery. A master is bound to see that his machinery is kept in good working order, that the provisions of the Factory Acts as to fencing are properly observed, and that in point of strength and construction it is sufficient for the purpose to which it is applied. Thus, if an engine-driver is injured through his engine coming in contact with a quantity of rubbish on the line, which it was the duty of the Railway Company to have prevented, the company are answerable (*Morris v. Monkland Railway Co.*, 19 D. 360). At the same time he is not answerable for latent defects, when his ignorance of their existence is not due to his own negligence.

MR KENNEDY'S CASE.

THE English bar would seem recently to have acquired in professional matters a rather unpleasant notoriety. The curious spectacle of a popular favourite, who united to the labours of his profession the duties of a representative of the people, testifying in a foreign land his sympathies with the cause of liberty, had scarcely ceased to excite surprise, when the public ear was startled by whispers that ultimately betrayed a lifetime of corruption and dishonour. And the bar had just rid itself of the disrepute of Mr Edwin James' connection, when another scandal rose to ruffle its serenity. In some respects the second case had points of contact with the first. Mr Edwin James and

Mr William Digby Seymour were both, in the ordinary sense, favourites of the people; both had been carried to their position at the bar on the tide of popular applause; both had acquired a certain measure of parliamentary distinction; and the reputation of both was greater beyond than within the ranks of their profession. But in one important respect their cases present a difference; and it is a difference that, in the pages of a professional journal, we must be scrupulous to observe. While Mr James, after a patient, and we are willing to believe, an impartial inquiry, was subjected to the highest indignity, short of criminal proceedings, that could be offered to him, Mr Seymour's conduct did not provoke a stronger punishment than the censure of his legal brethren. We believe it has occasioned a very general feeling of regret, both in this country and in England, that the facts and grounds upon which the benchers of the Middle Temple arrived at their conclusion in the latter case, have not been given to the public. Whether in these circumstances we are justified in noticing the rumours that prevail in reference to the charges preferred against Mr Seymour, may suggest a difference of opinion; and we are, on the whole, inclined to believe, that in the present state of our information, it would not be desirable to entertain the subject. We have less difficulty in dealing with a third case, that has more recently brought the English bar in a prominent way before the public. Here also, indeed, our position is not altogether free from doubt, because, in discussing a matter which is still to some extent *sub judice*, we would seem to be usurping a function which, up to a certain stage in the progress of a cause, is peculiarly a function of the Court. But it is not with the legal aspects of the case that we principally propose to deal in taking up the case of Mr Kennedy. The influence which it is calculated to exert on the constitution and practice of a distinguished branch of our profession, gives it claims on our attention which we cannot readily ignore.

The facts of the case have been for some time before the public; and if little attempt has been made to estimate their bearings in a social point of view, it is very much due to the circumstance, that while many of the aspects which it presents are of a novel kind, they lie to a large extent in a region which is not wont to be the subject of much public inquiry. The lady who is the defender in the present action was, it will be remembered, a few years ago the pursuer in another action, which does not yield to its

successor either in celebrity or importance. In possession of the estate of Swinfen, to which she had succeeded on a bequest executed by her father-in-law, she was sought to be excluded from it, on the ground that the deed of gift had been unduly impetrated from her ancestor. Sir Frederick Thesiger, now Lord Chelmsford, was her counsel in the suit; and while in progress, acting in opposition to his client's wishes, he compromised her claims in consideration of L.1000 a-year, to be paid to her by the heir-at-law. Under what motives his Lordship took this step,—whether, from his own view of the case, he considered it the most prudent course which, in the circumstances, could be followed for his client, or, as has been suggested, he was influenced by an indirect expression of opinion conveyed to him from the bench,—does not exactly appear; but the fact that his assumption of pretended right was made in defiance, not only of his client's wishes, but of her special instructions, has been incontestably proved. Ultimately Mrs Swinfen succeeded, by an action at law, in reducing the compromise to which her counsel had acceded for her; and the question at issue between her and the heir-at-law was in consequence reopened. In this position of matters, she made the acquaintance of Mr Charles Rann Kennedy, a member of the English bar, a gentleman who, in more than one sense, has had a most material influence on her fortunes; and it is the narrative that arises from this juncture that we desire at present to bring under the notice of our readers. On a former occasion we took the opportunity of adverting to the conduct of Sir F. Thesiger, and to the legal doctrine which it suggested for discussion; and we do not now propose to recur to the first branch of the case, except in so far as its facts are necessary to elucidate the second.

In regard to the commencement of the case—and the manner in which proceedings were initiated is in some respects material—it is difficult to condescend on an explicit statement of facts; and, indeed, the case is subject to considerable obscurity throughout, from the circumstance that the averments on both sides depend mainly on the testimony of the contending parties themselves. On the one hand, Mr Kennedy says that Mrs Swinfen was reluctant to take action in regard to the proceedings which had been opened up by the reduction of the compromise; and this statement, which rests on his own authority, and is contradicted by the lady, does certainly not appear in harmony with the fact, that it was at her own urgent solicitation and action that the compromise was reduced. On the

other hand, Mrs Swinfen maintains that she never entertained any idea of abandoning her claims—that Mr Kennedy was introduced to her at his own request, and tendered his services for the conduct of the suit; and we fear that the subsequent facts of the case do not afford any presumption that, in saying so, Mrs Swinfen is not stating the truth. But whatever be the exact position of this matter, there can be no doubt that, soon after the acquaintance was formed, Mr Kennedy was constituted, in regard to the Swinfen suit, Mrs Swinfen's legal adviser. There is also no doubt of the fact, that the friendship that arose between the parties assumed, almost immediately after its commencement, a footing of the most intimate kind, and continued so until causes, that are not difficult to understand, induced an aversion equally strong. At the date of Mr Kennedy's first appearance in the case, he was a practising barrister in Birmingham, in receipt, it is believed, of an income of L.800 or L.900 a-year. This position he continued to retain for some time, communicating with Mrs Swinfen as occasion required; but finding ultimately—and that in this judgment he was right, we are rather disposed to concur—that the attention necessary for Mrs Swinfen's case was incompatible with the maintenance of his practice, and being required to take his choice between the risks of the one and the certainty of the other, he gave up his position in Birmingham, and, with his client, took up his abode in London. Henceforward he threw himself into her case with an ardour which, while in some respects it is difficult to realize, it is impossible at the same time not to approve and to admire. That his zeal was stimulated by a variety of causes—partly by the prospects of great professional laurels, partly by the ambition of succeeding in a cause in which a great leader of the bar had failed, partly from a natural interest in the peculiar circumstances of the case itself, partly from a personal attachment to his client, partly by the hope of large pecuniary reward—is a proposition that may be very reasonably advanced. His own admission is, that he was mainly influenced by the latter two considerations; and, keeping in view that the passion for his client is an element which appears somewhat later in the history of the case, we are disposed to believe that his first enthusiasm was to a very large extent induced by the prospects of professional gain. But an analysis of Mr Kennedy's probable motives is not the inquiry which we propose to undertake in our treatment of the case. It is sufficient for our purpose to know, that after most extraordinary

exertions, he succeeded in establishing his client's right; that ultimately he instituted an action against Mrs Swinfen concluding for L.20,000, alleged to be the sum promised to him as the reward of his services in the event of success; that at the late trial on the Midland Circuit, the jury found, in point of fact, that the promise had been made to him, and, so far, that he was entitled to satisfaction of his claims. Whether the jury had materials before them to justify the verdict at which they arrived, is a question on which we do not care to enter. One fact, we have no doubt, weighed with them—and it is not an unimportant one—that Mrs Swinfen had offered to compromise Mr Kennedy's demands, and that Mr Kennedy refused. The verdict, as it stands, subject to the appeal which has been taken in point of law in regard to the validity of such a contract as the jury held to be proved, is what alone we wish to deal with; and we believe that enough of the facts has been recited to enable us to enter into the question which the verdict raises. Other features of the case we pass over as wholly unsuited for the pages of a professional journal. The relation that subsisted between Mr Kennedy and Mrs Swinfen, previous to the dissolution of their friendship, is suggestive of many points of interest; and we are disposed to think that an investigation into the private history of both would at once throw light upon the transaction, and would create a sympathy with Mr Kennedy, of which, in large measure, both in the popular mind and in the public press, he has been most unreasonably deprived. But in entering on such ground we should be usurping a function which does not fall within our province, and which we have no desire to entertain. The case, as it bears indirectly on certain principles of law, and more fully and immediately on the constitution of a distinguished branch of our profession, has claims on our attention sufficient to relieve us from the necessity of a popular appeal.

Two points of law are raised by the appeal which has been taken in the case of Kennedy. First, Whether the contract which the jury held to be proved is invalid, in respect it was entered into by a member of the bar with his client, without the intervention of a solicitor; and, secondly, Whether the contract was one to which a member of the bar, or of the profession generally, could be a party in any shape at all. In Scotland we are not aware that the former question has ever been directly raised for argument in a Court of law; the strictness of our rules of pleading, and the complete

separation that exists between the two branches of the profession, do not make it very probable that such questions will arise. The principle raised under the second question would seem to have been more frequently entertained. In the famous case of *Waddell v. Hope*, where it appeared in the course of the suit that the law agents of the pursuer had obtained the funds necessary for its prosecution, on condition of a certain sum to be paid to them in the event of success, and it was proposed that, in virtue of this agreement, the law agents should be ordained to sist themselves as parties to the action, although no ruling was made expressly on the point, the observations that fell from the Court must undoubtedly be held to imply that such a contract is not repugnant to the principles of our law. It is difficult, indeed, to see upon what ground it can be maintained that the mere amount of the contract affects its validity, if the general conditions of fair and honest dealing are preserved. And in practice it is notoriously a matter of everyday occurrence, both in England and in Scotland, for members of the bar to value their services at a price below which they will refuse to act in any case at all. The general rule, undoubtedly, even in special cases, is not to interfere with arrangements that, on the highest grounds of professional propriety, have been esteemed to lie in the discretion of the agent. But agents themselves, as is well known, claim a right in particular cases, as in railway contracts and other branches of conveyancing, to regulate their own fees; and there seems no ground upon which it would be reasonable to deny the same latitude to counsel. Notwithstanding this general recognition, however, of the principle in our law, it cannot be said that its application to such a case as that of Kennedy is free from doubt; and the same remark, we believe, holds good of the law of England. The validity of such a contract, therefore, would seem to furnish a convenient opportunity for discussion.

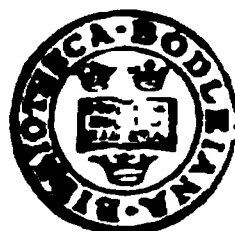
The discussion which we propose to undertake falls under two branches, with each of which we shall deal separately, and, as our space is limited, in very general terms. Under the one, the question rises, How far is such a contract consistent with the practice of the profession, or, as it is generally put, with the 'etiquette of the bar?'—under the second, How far, irrespective of the 'etiquette of the bar,' is such a contract consistent with the principles of justice, and the rules of fair and honest dealing?

To the first question we have no difficulty in at once returning a negative answer. On no other point, perhaps, is the practice of the profession more explicit than in the relation between counsel and agent, according to which the former is held to transgress his province whenever he receives and acts upon instructions that are not communicated to him through the direct medium of the latter. And we may frankly state our belief, that no rule, perhaps, of the profession has conduced more largely to build up the reputation of the bar of this country, both in respect of honourable dealing and of a high-minded and an intelligent discharge of duty ; and in view of such considerations, no rule would seem better worthy of being strictly and sacredly maintained. To foster a high tone of feeling in the profession is absolutely indispensable, not only to preserve its own interests, but the interests of society ; and if this result is sometimes purchased at the expense of individual hardship, and is sometimes coloured by the presence of a little sentiment and unreality, no person, except one who is ignorant of all history and experience, will be disposed to grudge the sacrifice by which it is secured. We have only to look to America, where, notwithstanding the presence of individual cases of rare honour and capacity, the general tone of the bar is inferior in comparison with ours, to be satisfied of the policy of an arrangement which, in that country, is absolutely ignored. In Scotland, indeed, it is difficult to conceive a case where a counsel could accept fees directly from his client without operating injustice to other branches of the profession ; and that of itself is an argument which should command a sufficient appeal to the feelings of an honourable man. On a double ground, therefore,—because in the first place it conduces to elevate the character of the profession, and because, secondly, it is necessary to preserve the interests of others who have as great a stake in the profession as the members of the bar,—we think that the relation between counsel and agent, as at present constituted, ought, in the general case, to be rigidly maintained.

And yet we have no sympathy with the wretched sentiment that is so often uttered in name of the 'etiquette of the bar.' That Mr Kennedy accepted the management of the Swinfen case upon terms which the great majority of the bar would not for a moment allow themselves to entertain, is a fact which cannot be denied ; and the obvious breach of a professional rule might have afforded a very good pretext for investigation into a case which is at once

exceptional and peculiar. But simply to found upon the fact, that in circumstances of a most extraordinary kind, a deviation was made from the ordinary rules of practice, and in consequence of such deviation, and of that only, to brand the delinquent with every invective of calumny and reproach, is, we humbly think, to attach to such rules an importance which, inherently at least, they do not possess. And yet this is the treatment to which Mr Kennedy has been subjected in newspaper discussions, and more particularly by the leader of the press. The case altogether, in every feature and detail, was, in the last degree, peculiar; and, considering that the statements of parties rested on their own authority, and were in themselves contradictory, and that no inquiry to elicit the truth has hitherto been made, such censorious criticism is manifestly unfair. A tribute to the 'etiquette of the bar' is a proper thing in its own place; and the 'etiquette of the bar,' we are happy to think, is entitled, when it is justly interpreted, to the very highest praise. But the 'etiquette of the bar' is not, in any case, entitled to override the principles of common justice and of common sense; and to establish an opposition on a formal point between a rule and the breach of a rule, without a regard to the circumstances in which the breach occurred, is an idea that would seem to be born rather of prejudice than reason.

But it is impossible to advert to the circumstances of the case without being reminded of the second branch of our discussion, under which the question of real importance lies. How far, irrespective of the 'etiquette of the bar,' was the contract which Mr Kennedy entered into with Mrs Swinfen a violation of the principles of justice and of fair and honest dealing? Without a consideration of the circumstances, we believe that this question cannot be fully answered; and although it is true that in some respects they are involved in obscurity, we think a sufficient foundation of fact may be obtained to enable us to form a judgment. And here a little recapitulation of what we said before is necessary. At the date of Mr Kennedy's first introduction to Mrs Swinfen, he was in the enjoyment of a yearly income of L.800 or L.900, derived from the emoluments of his practice. For a man of his standing at the bar, this success could not be said to be considerable; and there was, therefore, nothing in his circumstances to withdraw him from the action of inducements that would not have tempted other men of the same reputation and capacity. How the acquaintance was



originally formed, is not, as we previously remarked, an immaterial question, because the facts upon that point might enable us to form an estimate of the motives upon which the parties acted. If Mr Kennedy, attracted by the prospects of the suit, in which he was ultimately victorious, courted an introduction to Mrs Swinfen, and tendered his services as counsel,—as was notoriously the practice of a late, not deceased, member of the English bar,—we should not hesitate to stigmatize his conduct as a breach of professional propriety of the most serious kind. But there is no satisfactory evidence that he did so; on the contrary, from certain concomitant circumstances, it would appear that the first advances towards acquaintance were on the part of the lady. One fact, however, is clear,—and in presence of it we think that speculation on this point may be dispensed with,—and that is, that Mrs Swinfen has proved herself, from the commencement to the close of these transactions, to be possessed of considerable worldly wisdom, and well qualified to guard her interests for herself. And this consideration is of the utmost importance, and deserves to be regarded at the first step of the inquiry; because, in such a case, it is of the very essence of the charge that the transacting party has taken advantage of the ignorance or simplicity of his client. On the other hand, the attachment that sprung up between Mr Kennedy and Mrs Swinfen belongs to a later date in the history of the case; and there is no pretence to say that, in making his bargain, Mr Kennedy trafficked with her feelings, and was guilty of an act that—in any case a scandalous immorality—would, in the peculiar circumstances of his position, have reached the very *acme* of dishonour. It is another feature worthy of attention, that perhaps the most common element in which such contracts have their origin is wholly wanting in this case. Mr Kennedy was not a man of means, able to give temporary accommodation to his client, and therefore in a position to impose conditions favourable to himself. There is no allegation that Mrs Swinfen was in need of pecuniary assistance, nor that Mr Kennedy, either with his own means or the means of others, embraced the opportunity of affording her relief. The contract between the parties was one in which the time, labour, and professional capacity of the counsel were to be purchased and presently enjoyed by the client, in consideration of a certain sum to be paid in an uncertain event; and the question, and the only question, is, Whether in such a contract the purchase price was too large?

IN answering this question, it must be held in view that Mrs Swinfen, in dealing with Mr Kennedy, acted on the supposition that his services were absolutely indispensable to the successful issue of her suit. And, looking to all the circumstances of the case—to the manner in which it had its origin—to the difficulties and opposition which were encountered in its progress—to the peculiar temperament of the counsel, and the self-devotion with which he espoused his cause—and, not least, to the victory which rewarded his exertions—it would be somewhat hazardous to say that, in the conclusion to which she came, Mrs Swinfen was wrong. We are not, indeed, prepared to say that no other member of the bar could be found adequate to the discharge of the professional duties which Mr Kennedy performed. In every point of view, that would be a preposterous proposition, and we are not called upon to advance it. Our position simply is, that the success of the Swinfen suit was the result of a combination of causes, and that it is not unreasonable to assume that no other person *but* Mr Kennedy could have led these causes into operation. The mere professional work done was the least part of it—the great battle was fought in the preparation of the cause; and the preparation of the cause, it is well known, was due to the co-operation, under very peculiar circumstances, of the parties who were interested in success. Whether, under the same circumstances, two other persons could have co-operated to the effect of attaining the same result, may be very reasonably doubted.¹ Mrs Swinfen herself declared that Mr Kennedy was a person raised up by God to befriend her; and, without giving in our adhesion to the doctrine of a special providence, we are prepared to admit that there is much in the circumstances of the case to give colour to the sentiment. In calculating the purchase price of the contract, therefore, we start with the assumption, that without the services of Mr Kennedy Mrs Swinfen would have lost her case. And if that be so, three things fall to be considered under the question with which we are now dealing. What, in the first place, was the value of the professional services which Mr Kennedy rendered? What, secondly, was the value of the position and prospects which he sacrificed in order to place these services at his client's disposal? What, thirdly,

¹ In dealing with the Swinfen case, our remarks are throughout based on the assumption that Mr Kennedy acted by himself, without the intervention of a solicitor. In point of fact, it has been shown that the first communications with his client were made through the medium of a solicitor, but substantially he was the only actor; and we are prepared to argue the case on the footing that he was so.

was the value of the risk which he ran, of not having his professional services rewarded at all? The details of the first *item* are very obvious, and they will naturally suggest themselves. As Mr Kennedy puts it, they include travelling and personal expenses, fees for drawing reports, fees for pleading, etc.; and, considering the time that the case was in progress, the amount must be considerable. The calculation under the second head embraces an estimate of Mr Kennedy's age—of the number of years for which he might reasonably hope to enjoy the emoluments of his practice—of his chances of professional advancement—of the provisions which, as a husband and the father of a family, he was bound to make in the event of death; and the calculation is a problem in arithmetic which we shall leave our readers to solve for themselves. The third *item* involves a somewhat nicer question, and our space will not admit of our dealing with it in detail. But the principle that risk is a legitimate ground of contract, is sufficiently familiar to our law; and in presence of the extent to which it enters into the doctrine of insurance, any argument in support of it would be superfluous and uncalled for. On the whole, Mr Kennedy, we must admit, had fair grounds for maintaining that the three items, taken together, would amount to a sum little short of L.20,000.

And if our calculation is right, we have arrived at this conclusion. On the one hand, we have a contract which, interpreted by the general practice of the profession, is undoubtedly a breach of the 'etiquette of the bar;' on the other hand, a contract which, considered irrespective of this specialty, has nothing in it inconsistent with the rules of fair and honest dealing. A conflict is thus raised between two results which are both important, but important in unequal degrees; and we have no doubt in our own mind upon which it is proper to impose the sacrifice. We do not argue, it must be observed, that in all cases where an opposition rises between justice and mere professional propriety, justice, as the paramount consideration, must prevail. In the practice of the law, examples of such an opposition might be multiplied indefinitely; and it would be absolutely fatal to the standing of the bar, and therefore, in the end, subversive of justice itself, if the principle which we are now recommending were so widely recognised. On the contrary, we still adhere to our former statement, that, in the general case, professional rules must be rigidly maintained. But no rule is inflexible; and while it is always a delicate question to determine in what circumstances

a rule of stringent application may be violated, we are prepared to submit that these circumstances have occurred in the case of Mrs Swinfen. And, in advancing this proposition, it must be observed, we are not suggesting any test by which, in cases of conflict, the action of parties is to be determined. Every case depends upon its own circumstances; and any person who takes upon himself the responsibility of departing, on a professional point, from the rules of his profession, must abide by the judgment that is passed on these circumstances. And in all cases that is peculiarly a matter of opinion.

W. A. B.

New Books.

Notes on the Marriage Laws of England, Scotland, and Ireland; with Suggestions for their Amendment and Assimilation. In a Letter to the Right Honourable the Lord Chancellor. By JAMES MUIRHEAD, Advocate, and of the Inner Temple, Barrister-at-Law. Wm. Blackwood and Sons, Edinburgh and London. 1862.

THERE is no department of our law in which reformers are more welcome, but there is none in which they must walk more warily, that in that which relates to the formation and consequences of the marriage tie. On the one hand, no known evil connected with it should be suffered to exist; on the other, no changes should be made by way of experiment only, or to gratify the prejudices of any social theorist. In former times, men were too much inclined to think that whatever was, was best. Now, many rush to the other extreme, and would be for turning the world upside down, in the hope that it might settle down more evenly than in some particulars it presently exists. We sympathise with neither of these classes; and we would not willingly see the laws of this country committed to the charge of men belonging to either of them. Especially would we regret to see them taking under their protection the law relating to marriage, which, as Lord Stowell beautifully said, is the parent and not the child of civil society. We are glad to say that Mr Muirhead, the author of the excellent pamphlet before us, belongs to neither class. While anxious to suggest remedies for the defects which he conceives to exist in the various marriage laws of the United Kingdom, he is desirous of applying these remedies with a

careful hand, and deprecates all changes, the beneficial effects of which have not been placed beyond the pale of mere speculation.

The position with which Mr Muirhead starts is one from which few probably will dissent, viz., the misfortune that there should be within such narrow limits as those of the United Kingdom, no less than three different laws of marriage, and the great benefit which would accrue, if, by mutual concessions and assimilation, a uniform code could be devised.

'If,' says he, 'there be one branch of a country's municipal law which ought to be uniform, simple, and free from dubiety, it is that which regulates the constitution and consequences of marriage. But what is the case in this kingdom? England has one law, Scotland another, and Ireland something different from either. This is neither seemly nor expedient. It is not seemly that a woman cohabiting with a man in England should, under certain circumstances, be regarded only as his mistress, while one living in the same circumstances with another man in Scotland should enjoy the status and privileges of a wife; yet this we see daily. It is not convenient that a child who is legitimate and his father's heir in Scotland, should be treated as a bastard and held incapable of succession in Ireland; yet this, too, is of not unfrequent occurrence. Surely something might be done to remove this scandal.

'It is but natural that each of the three countries should be tenacious of its peculiar procedure, and regard with suspicion any one hardy enough to call in question its wisdom or propriety. And herein lies the greatest difficulty of effecting anything like an assimilation of the diverse systems. Let the Scotch marriage law but be mentioned before an Englishman, and such an amount of vituperation is immediately launched against it, as would lead an indifferent person to fancy it must be something akin in its laxity to that old Celtic marriage law which Cæsar says at one time prevailed in our island; while, hear a Scotchman on the English system, and the idea will suggest itself that it must have been devised and developed for the special purpose of obstructing marriage and promoting concubinage. Those, of course, who have taken the trouble to look into the matter, know that neither the one nor the other is so bad as it is represented; but in the public mind there is an amount of ignorance not only about the comparative merits, but also about the distinctive peculiarities, of our three marriage laws, which is greatly to be deplored. Could that ignorance be to any extent removed, I think there would disappear along with it a good deal of that traditional prejudice which is now the chief obstacle to an assimilation, or, at all events, a pretty near approximation, of the marriage laws of the United Kingdom.

'It was with considerable regret, therefore, that I observed Sir Hugh Cairns, in committee on his bill, lend the sanction of his name to the notion that such an approximation is impracticable. No doubt, the differences of creed—or, to speak more correctly, of denomination—which prevail among us to so lamentable an extent, render it troublesome; and the difficulty is every year increased by piecemeal legislation. But if France, Prussia, and Austria, with populations as various in their religions, have not found it impossible to include them all within the same marriage laws, why should we? Englishmen, Scotchmen, and Irishmen, recognise as inherent in the relationship of marriage the same rights, the same duties, the same obligations; what is there that should make them differ so much about the manner of its constitution? Is there any reason in nature, in the construction of modern society, or in the peculiar tenets of any of our numerous "churches," that can either necessitate or justify the diversity of law and custom that exists amongst us? Surely if any one of those three systems is perfect in the country that is blessed with it, that most invaluable quality would not forsake it were it introduced into the two that are less fortunate. And even

if all be open to criticism and amendment, one would think it ought not to be an impossible thing to select from each what is most worthy of adoption, and make it the framework of a uniform and comprehensive measure.

'Complete assimilation is more, perhaps, at present, than the prejudices and temper of the public permit one to anticipate. But I am sanguine that a more extensive acquaintance with the history of the law of marriage, and a more accurate estimate of the working, results, and comparative merits and demerits of the systems administered in the three divisions of the United Kingdom respectively, would go far to remove those prejudices, and pave the way for the ultimate introduction of an amended law, applicable to one and all of them.'

Mr Muirhead then proceeds to give a short account, first, of the Roman law of marriage, and secondly, of the canon law of marriage, both of which have exercised so large an influence on all modern systems of jurisprudence. These sketches are evidently the fruit of much research and consideration, and prove their author to be a man of scholarly attainments of no mean order. In some of his conclusions we confess we cannot quite concur; but he unquestionably supports them by a copious citation of authorities,—whether entitled or not to the full weight he assigns them, we do not at present stay to consider. He next turns his attention to the English law of marriage, and traces its development from the times of the Anglo-Saxon monarchs to the passing of the 19th and 20th of the Queen (c. 119). We may differ from Mr Muirhead as to the importance of the bearing of the old common law of England, prior to Lord Hardwicke's Act (26 Geo. II., c. 33), on the questions he discusses; but we cannot deny that his treatment of it has afforded him an opportunity for displaying his possession of much curious learning on a subject not often falling under the notice of practical lawyers. We admit our utter inability to test the soundness of his conclusions, because we are, from crass ignorance, utterly unable to appreciate the value of the authorities on which he relies. When he comes down to better known times and enactments, we can testify to the fairness and distinctness of his statement of the law which has gradually ripened into the present marriage code of England. We could have wished that the statement had been somewhat more full; but though brief, it is very clear and distinct.

From the law of England, Mr Muirhead proceeds to that of Scotland; and his summary of its provisions in regard to marriage is very excellent. His defence of our law against the charge of being 'complicated, uncertain, and unphilosophical,' we regard as very satisfactory, and his concluding statement on this branch of his argument is well worthy of quotation.

‘The fundamental principle,’ he observes, ‘upon which the marriage law of Scotland has all along been based, is this very simple one—*consensus facit matrimonium*. All that it requires in order to sustain the validity of the marriage is evidence of the deliberate interchange of matrimonial consent *inter legitimas personas*. No matter how, when, or where contracted; whether regularly or irregularly, with a ceremony or without it; so long as *constat de consensu* in any of the ways I have indicated, the marriage is a good and valid one to all intents and purposes.’

The last portion of the historical part of the pamphlet is occupied with an account of the Irish law of marriage, which places in a very clear light the strong reasons which exist for its amendment.

Having dealt with the English, Scotch, and Irish laws in detail, Mr Muirhead then proceeds to inquire how far, and in what way, it may be possible to reduce them to one uniform and comprehensive system. The fundamental principles of the system he would like to see adopted may be gathered together thus:—

‘For its protection and encouragement society has wisely attributed to it important civil consequences: as, in England, the husband’s right to the property of the wife, and that of the widow to dower; in Scotland, the *jus mariti communio bonorum*, and right of legitim; in all, the children’s right of succession as their parents’ heirs. These are rights which it is in the power of society to confer or withhold; and to the enjoyment of which it is perfectly entitled to annex its own conditions. Society is quite entitled to say to persons about to marry, that, in order to obtain *those civil benefits* of matrimony, they must celebrate the rite with certain consents, in a certain place, at a certain hour, and before certain witnesses; but, unless every one of those requirements be perfectly easy of observance,—*so easy that their non-observance will legitimate the presumption that the parties do not really mean what they pretend*,—it is not entitled, merely on account of their omission, to declare the marriage invalid as to its *natural consequences*,—the right of each spouse to the *consortium* of the other, and of the children to be nourished and cared for by their parents, not as bastards, but as lawful issue. . . . The only conditions the State ought to impose, under penalty of *nullity* of the marriage in case of non-observance, are these two:—(1), That the purpose of the parties be duly published for a certain time beforehand; and (2), That the celebration be in the presence of at least two witnesses besides the celebrator. And even these conditions the civil power is not justified in imposing, unless it make the facilities for compliance with them so great, both pecuniarily and otherwise, that, as I said before, non-compliance may fairly raise the presumption that the parties do not care whether the alliance they contemplate be marriage or concubinage.’

Mr Muirhead then states very distinctly what he considers necessary in the way of publication:—

‘All that seems to be necessary in the way of publication is, that a person proposing to marry should give notice of his or her intention to the registrar of the parish or district in which he or she has resided for seven, or say for fourteen, days previously; stating his or her condition, and profession or trade; the name, condition, profession or trade, and place of residence, of the other party; the ages of both; whether the consent of parents or guardians, where necessary, has been obtained by the party giving the notice; and what are the names and addresses of such parents or guardians. This notice, on payment of a fee of, say, a shilling, it should be the duty of the registrar to enter in his marriage-notice book, so as to be open to the inspection of any one caring to examine it;

at the same time exposing the names of the parties in a prominent place outside his office, and, where consents are necessary, intimating the notice, by sending a copy thereof to parents or guardians. It should further be his duty, at the end of fourteen days from the day of notice, and on payment of another small fee, to issue a certificate of notice and due publication thereof, which, along with a similar certificate obtained by the other party, should be sufficient warrant to the registrar himself, or any authorized clergyman in the parish or district, or to the registrar or any authorized clergyman in the parish or district in which the other party resides, to proceed to celebrate the marriage within such parish or district at any time within a month from the issuing of the certificate earliest in date. Circumstances might sometimes, but, I should think, very rarely, render the delay of fourteen days for publication impossible; to meet such a case, power might be vested in the Registrar-General to dispense with notice, on satisfactory cause shown; his dispensation to endure for eight days.'

He then deals with the objections to a proposed marriage which he thinks should be sustained; and he limits these to three—'want of lawful age, a prior subsisting marriage, and consanguinity or affinity.' He would give parents or guardians the right of objecting to the marriage of 'a child or ward, under 20 if a male, under 17 if a female, who had not obtained their consent to the union.' Lastly, as to the place of celebration, he says,—

'I confess I can see no good reason either of policy or order why, after due publication of their proposed marriage, the parties should not be left free to have the ceremony performed either in parish church, certified building, registrar's office, or private house; and, except when in the registrar's office, at such hour as may be most convenient for the celebrator, themselves, and their friends. The only condition that ought to be exacted of them, under penalty of nullity, should be, that, besides the celebrator, at least two witnesses should be present at the marriage.'

We have thus given a short, but we think a fair, account of 'the uniform and comprehensive system' which Mr Muirhead would substitute for the respective marriage laws of England, Scotland, and Ireland. We do not propose to express any opinion upon it, but rather leave our readers to judge of it for themselves. Manifestly, it is chiefly modelled on the law as it now exists in England, and its necessary consequence would be to abolish the present law of Scotland, in so far as it recognises the validity of irregular marriages. So grave a change would need to be very carefully weighed ere it was sanctioned by the Legislature. Mr Muirhead is very sanguine that his plan will be acceptable to the people of Scotland.

'Give,' says he, 'the people of Scotland facilities for contracting marriage regularly, at a trifling expense and without inconvenience to the parties—facilities so great that, to repeat what I have said more than once already, neglect or refusal to take advantage of them may legitimately raise the presumption that marriage is not really intended—and the whole system of irregular marriage may safely be abolished. I have not the least doubt that the majority of the people of Scotland, for the sake of obtaining so great a boon as a uniform legis-

lation for the United Kingdom, would consent to sacrifice this much of its ancient and cherished common-law.'

In conclusion, we have only again to say, that this pamphlet is, both from the learning which it displays and the ability with which it is written, highly creditable to its author, and to the junior bar of Scotland, of which he is a member.

THE MONTH.

Publication of Protests.—We beg to direct public attention to the following extraordinary document, which has been sent to all the Sheriff-clerks, from the Exchequer. For some years there have been in existence in Edinburgh and London certain weekly publications, which make it their business to publish, for the 'protection of trade,' along with other information, the protests on bills and promissory notes recorded throughout the country. A sight of the records of a Sheriff Court may be got by any one for the asking, on payment of a fee of 1s. 3d.; and the publications referred to have hitherto had agents of their own at the seat of each Sheriff Court, who called once a week at the office of the Sheriff-clerk, paid the fee, and copied the particulars they required. To this course there are two manifest objections:—1st, It was expensive to their employers; 2d, it was dangerous to themselves, because, in the event of making a mistake, such as happened in *Reid v. Outram & Co. (The Glasgow Herald)*, they might possibly be subjected in damages. The Queen's and Lord Treasurer's Remembrancer comes to the rescue with the cool proposal that henceforth the Sheriff-clerks shall make the returns themselves! We should like to know what authority Mr Henderson has for making such an order. Is the Government going into the publishing line; and on what ground is only one publication included in the mysterious 'arrangement' which has been 'submitted to and approved of by him?' The returns, specifying the date and amount of the bill, acceptor, drawer, and holder, are to be sent to a certain Mr Caird, 2, York Place, Upper Street, Islington, London. What possible interest can the revenue of the country have in the success or failure of the private speculations of Mr Caird? The 'doubts' referred to at the beginning of the letter are, so far as we are aware, strictly confined to Mr Henderson himself. There is no earthly doubt on the subject—the fee is fifteen pence; neither more nor less.

'SIR,—Doubts having arisen as to the proper amount of the fees exigible by the Sheriff-clerks from parties inspecting the Record of Protests kept in their departments, I have to inform you that, by an arrangement submitted to and approved of by me, it is proposed that on Friday, weekly, commencing on Friday next, the 23d instant, the Sheriff-clerks of Scotland shall fill up, from the Instruments of Protest given in to be extracted for each preceding week, when there are any, up to each Friday, the information required by the printed headings of the accompanying Schedules, and to post on that day, in one of the accompanying envelopes, the weekly Returns so made up.

‘With regard to the Register of Protests in those towns in the North of Scotland where, if posted on Friday, the Return would not reach London on Saturday morning, it is necessary that the Sheriff-clerk make up his Return and post it on such other day as shall ensure its reaching its destination on Saturday morning by the first delivery.

'At the end of each quarter, commencing on the 23d instant, there will be remitted to you the sum of one shilling and threepence as the fee for each such Return, together with the postages; and the fees so remitted must be entered in the account kept by you and rendered quarterly to Exchequer.—I am, etc.,

(Signed) 'JOHN HENDERSON, Q. and L. T. R.'

| Date and Currency of Bill. | Amount of Bill. | Date of Recording. | Acceptors or Promisers. | Drawers, Payees, and Indorsers. | Holders. |
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The South Leith Case.—The ordinary Courts of law have the proverbial character of administering justice in a dilatory, uncertain, and expensive manner. Defective, however, as their judicial system may be, recent experience of other judicatories tends to reconcile us to them, with all their faults and imperfections, and to make us feel thankful that the interests of the public are not confided to such tribunals as the Court Martial and the Presbytery. The parody upon judicial procedure which has just been enacted at South Leith, at so much expense of time and money, is so great a public scandal, and

must, if repeated, prove so injurious to the true interests of the Church of Scotland and of religion, that it is to be hoped some effort will be made to prevent its recurrence. The Church Courts, ill adapted as they are for dealing with offences which involve ecclesiastical censure and discipline, are still less suited for grappling with those intangible objections which have been the creation of Lord Aberdeen's Act. That most unsatisfactory compromise between patronage and non-intrusion has been all along the source of mischief and discord in the Church, and the evil has now attained such a height as to call for legislative interference. The Act prescribes that the Presbytery, or other judicatory of the Church, shall, in cognoscing and determining judicially on the objections to the presentee, or the reasons against his settlement, 'have regard only to such objections and reasons so stated as are personal to the presentee, in regard to his ministerial gifts and qualities, either in general, or with respect to that particular parish; but shall be entitled to have regard to the whole circumstances and condition of the parish, to the spiritual welfare and edification of the people, and to the character and number of the persons by whom the said objections or reasons shall be preferred.' At the same time, the Presbytery is not to give effect to objections 'that arise from causeless prejudices,' or 'to reject any presentee upon the ground of any mere dissent or dislike expressed by any part of the congregation.' The vague and general language of the Act, which seems to have been ingeniously framed for the purpose of bearing what interpretation either party in the Church might wish to put upon it, opens a wide field for discussion on the relevancy of the objections stated, and affords ample scope for the exposition and gratification of the peculiar views of the judges on the question of non-intrusion; in fact, resolves a judicial settlement of the relevancy into a party question. Some illustrations of objections that have been admitted as relevant points for judicial investigation and determination, can hardly fail to provoke a smile; such, for example, as that the presentee's style of preaching is not 'level to the capacities of the parishioners,' not 'instructive nor impressive,' or 'cold and dry,' and that his prayers are 'devoid of fervour and unction,' or 'lukewarm and unimpressive.' It must be admitted that the Church Courts have a hard task to perform in returning a verdict on such an issue; and that, considering the latitude of tastes on such matters, even the most impartial judicial mind would be somewhat puzzled to determine whether a discourse was cold, or a

prayer void of unction. It is simply a burlesque on judicial procedure for a Court to take evidence and sit in judgment on such questions. If part of the blame of the scandalous state of matters in the Church Courts is attributable to the nature of the questions entertained, part also is due to the constitution of the Courts themselves, and to their system of procedure. The Court, to try a particular cause, unlike any other known tribunal, is composed of a body that fluctuates during the trial,—each member of Presbytery being entitled to exercise the right of pronouncing judgment, although he has not been present during the whole of the trial, or has heard the evidence on one side only, or has heard nothing on either side. The necessary result of such a protracted trial as that at South Leith is, that several, if not all of the judges, have been absent during some part of the cause, and that during its various stages the Court is composed of different judges, holding, it may be, opposite views; a state of matters which cannot either facilitate progress, produce consistency of judgment, or tend to ultimate justice. The popular and partisan character of the Church Courts, their want of familiarity with forms and procedure, and their limited experience in dealing with evidence, must necessarily tend to retard the progress of a cause, and give rise to much inconsistency of decision. There is room for reform, also, in the system which allows an appeal on fact as well as law from the Presbytery to the Synod, and from the Synod to the General Assembly—from judges who have heard the evidence and seen the witnesses to judges who have not, and whose sole superiority over the inferior Court is that of numbers. Where such patent defects exist, it is easy to point them out,—it is more difficult to suggest a suitable remedy. The evil might, no doubt, be to some extent mitigated by the repeal of the Aberdeen Act,—a measure upon the expediency of which all parties are now pretty well agreed, although not prepared to propose a substitute. Only two courses seem open in any succeeding enactment,—either to hold the presentation of the patron sufficient *per se*, apart from the consent of the congregation, provided the Church Courts are satisfied of the presentee's qualifications for the pastoral office, in respect of 'doctrine, life, and literature,' or to hold that 'no pastor shall be intruded on any congregation contrary to the will of the people.' Such an enactment would at least rescue Church Courts from the indignity of being compelled to go through the mockery of a judicial investigation and decision on such shadowy objections as have recently

engaged the attention of the Presbytery of Edinburgh. The appointment, by each Presbytery, of a committee of its members to determine judicial questions, whose duty it would be to attend throughout the hearing of a cause, would secure more able and, in course of time, more experienced judges, and obviate many of the evils at present arising from the exercise of judicial functions by a popular and fluctuating assembly ; more especially, if an appeal were allowed only on points of law to the General Assembly, or to a judicial committee appointed by that body, and the objectless intervention of the Synod as an intermediate Court of review were done away with.

Chair of Civil Law.—Since the important and responsible duty of appointing a professor to fill the Chair of Civil Law devolved on the Faculty of Advocates, all sorts of suggestions have been made as to the kind of professor that is needed, and the system of teaching that should be followed. If the period devoted to the study of Civil Law is to remain as at present,—a session of little more than four months,—and if students are to enter the class without any previous acquaintance with its studies, it seems idle to speculate on the acquirements requisite for a professor, or the mode in which he is to treat his subject. All that he can accomplish, or even attempt, is to furnish the students with a mere outline of the great field that lies before them. Until the proficiency of intending students is tested by an entrance examination, and the course of attendance prolonged, there can be little hope that, even under an able and energetic professor, the study of Civil Law will assume its proper place as an important branch of Scottish legal and university education. The nomination of two candidates, to be sent up to the University Curators, is fixed for Friday, the 6th of June. The candidates at present in the field are—Mr Norman M'Pherson, Mr Beatson Bell, Mr Stark Christie, Sir George Home, Mr Kinnear, Mr Muirhead, and Mr R. Campbell, jun.,—all members of the Faculty of Advocates.

New Appointment.—The Sheriff-substituteship of Haddington, vacant by the death of Mr Robert Riddell, Advocate, has been filled up by the appointment of Mr Charles Sherriff, Advocate. Mr Sherriff has for several years discharged the duties of a Reporter for the Session cases. The appointment is one which gives general satisfaction.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

MUNRO v. CUMMING.—*May 17.*

Contract in Writing—Sale.

This is an advocacy from Ross-shire regarding the sale of certain effects on the farm of Knockbain, which was effected in writing. There was an inventory, which was not signed; and the Court recalled an interlocutor of the Sheriff disallowing proof before answer, and admitted parole proof as to whether the inventory really formed part of the contract of sale.

YELVERTON v. WALKER.—*May 20.*

Reparation—Slander.

In this case, the Court, on the report of Lord Ardmillan, approved of the following issue, proposed by the pursuer in the action of damages in which Maria Theresa Longworth or Yelverton is pursuer, and James Walker, Esq. of Dalry, advocate, is defender, which is as follows:—
‘Whether, in or about the 1st day of January 1862, the defender did write and forward, through the Post Office, to the Honourable William Henry Yelverton, at Whitland Abbey, near Narberth, in South Wales, the letter, dated 1st January 1862, in the schedule appended hereto; and whether the defender did, in said letter, falsely, calumniously, and injuriously represent that the pursuer is a most degraded woman—that it is a disgrace for respectable persons to associate publicly with her—and that the said W. Henry Yelverton, by receiving her into his house, was bringing dishonour on himself and his relations,—to the loss, injury, and damage of the pursuer?’

Damages claimed, L.3000.

Adv., JOHNSTON AND OTHERS v. BRODIE AND OTHERS.—*May 2.*

Advocation—Friendly Societies Act.

This was an advocacy of a petition presented to the Sheriff of Lanarkshire under the Friendly Societies Act, 18 & 19 Vict., c. 63, by certain members of a society called the Scottish Legal Burial and Loan Society, against its office-bearers, complaining of its constitution and management. From statements made in the proceedings and at the bar, it appears that the Society numbers 54,500 members; that its revenue, which in 1860 was L.6750, is derived from weekly payments of one penny and other small sums, collected from the members by numerous agents established all over the country, and by them transmitted to the

head-office in Glasgow; and that the Society is of the character of a mutual assurance company, holding itself responsible for the stability of three schemes—one of benefits in time of sickness, another of benefits for funerals, and a third of loans to the members.

The petitioners (the respondents in the advocacy) alleged that in various important respects the constitution of the Society was not in accordance with the provisions of the Friendly Societies Act,—in particular, that the rules did not provide for the appointment and removal of the office-bearers specified in the Act, particularly of a treasurer, in regard to whom Rule 16 provides, ‘There shall be a cash account opened with one of the principal savings’ banks in the city, *which shall be instead of a treasurer*,’ and that the rules do not, as imperatively required by the Act, make provision for the payment of the expenses of the management of the Society by a separate contribution for that purpose, for which a separate account should be kept, but that these have been paid out of the funds contributed by the members to secure particular benefits, by which the funds had, to a large extent, been misappropriated. The petitioners further complained of the office-bearers failing to call annual meetings of the members; of their altering the rules of the Society without the consent of the members; of the secretary, James Steel, being virtually the treasurer, though he had found no caution for his intrusions; and of him and his son being trustees, and thereby having the whole funds of the Society in bank at their control. The petitioners prayed, *inter alia*, that the Sheriff would appoint a meeting of the members to be held to alter the rules, so as to bring them into exact conformity with the requirements of the Friendly Societies Act.

The Sheriff-substitute (H. G. Bell) sustained the jurisdiction of the Sheriff Court, and repelled the preliminary plea, and on the merits found that it was sufficiently instructed by the productions in process, and by the defenders’ admissions, that provisions had not been made in the Society’s rules for various matters for which it is imperatively required by the Friendly Societies Act that provisions shall be made; and he appointed a general meeting of the members of the Society to be held for the purpose of supplying the omissions and amending the irregularities in the rules, within a specified time, under a penalty of L.300.

On appeal, Sheriff Alison adhered to this interlocutor, so far as it appointed a general meeting of the members to be held for the purposes mentioned, but recalled *hoc statu* certain specific findings as to the alleged deviations and irregularities.

The petition was advocated to the First Division, who dismissed the advocacy as incompetent.

The Lord President—This is the first time this question has been before us. If this case is to be regarded as under the Sheriff Court, there can be no doubt that the advocacy is quite incompetent. If under the Friendly Societies Act, which confers a separate jurisdiction on Sheriffs, the competency will turn upon whether the Sheriff’s judgment is final. The Act says that the decision of the County Court in England shall not be subject to any appeal, and that in Scotland the Sheriff within his county shall have the same jurisdiction as is thereby given to the judge of a County Court. I am of opinion that this must be read in a broad sense, and that the Sheriff’s decision must be held to be final.

THOMSON v. BISHOP MURDOCH AND OTHERS.—*May 21.*

Servitude—Jurisdiction.

The pursuers in this action, for asserting right to a road at Dumbarton, are the Roman Catholic Bishop of Glasgow and the other trustees of the Roman Catholic chapel in Dumbarton. The defender is a tinsmith there, and it appears that he has taken possession of and built upon a portion of ground over which the pursuers claim a 'right and servitude of road.' They conclude that he should be 'decerned and ordained forthwith to remove and take away all buildings, walls, gates, stones, and obstructions of every kind from the *solum* and surface of the road lying immediately to the north and east of the pursuers' said property, and by which the pursuers' property is and always has been bounded on the north and east; of which road the pursuers, and their predecessors and authors, have, from time immemorial, had the free use, and over which they have the right and servitude of road.'

The competency of the action in the Sheriff Court was objected to, but, by interlocutor of 10th November 1858, Sheriff Hunter 'Finds that this is an action raised for the constitution and exercise of right of servitude: Finds, therefore, that it is competent without a declarator, and that the Sheriff has jurisdiction in it;' stating in his note that 'the statute 1 & 2 Victoria, cap. 119, sec. 15, confers on Sheriffs jurisdiction to try questions touching the constitution or exercise of servitudes.'

'No doubt can exist that the road which forms the subject-matter of this action is a highway or public road. This is proved by a body of evidence, documentary and parole. There are the minutes of the road functionaries, and there is a chain of oral testimony extending throughout a long series of years, and comprising the distinct recollection of ancient men, and the vivid observation and knowledge of the members of a younger generation. Although it must, to a certain extent and effect, have in its use been superseded by the new line of road formed, the old road continued to be subjected by the community to every use of which it was susceptible—walking, riding, and driving; it was used as a race-course; it was a play-ground for the young, and a lounging-place for men.'

The case was debated in the Court of Session on the point whether the action was not one for a servitude road, and whether the Sheriff's second judgment, giving a possessor right to a public road, was within the action as laid. The Court held, as the Sheriff had held at first, that the action was for a servitude road alone; that a public road was not described in the pursuers' pleadings; and that it was incompetent under this action to give a possessory judgment in a right of public way, that not being sought in it at all. They therefore recalled the interlocutors of the Sheriff, and dismissed the action, so as to allow the pursuers to bring a declarator of public right of way, if so advised, in this Court.

MRS CORMIE v. GRIGOR AND OTHERS.—*May 23.*

Agent and Client—Authority.

In this action of reduction and damages, Mrs Cormie has obtained decree in absence against her son and his assignee, Mr Gordon. She now insists

against Mr Grigor, writer, Elgin, who, she says, acted as her law agent without a mandate, and consented to decree going against her without her authority, in an action raised by her son against her in the Elgin Sheriff Court. This decree, it appears, he assigned to Mr Gordon, a writer; and he imprisoned Mrs Cormie, and took possession of her property. Gordon and her son are both said to be bankrupt, and they have ceased to defend. The son, in the first debate in the Inner House, has restricted her claim for violence attending her imprisonment, and for the damage to his property; and to-day the Court held that there were no averments to connect Mr Grigor with any of the acts of which the pursuer complained, except consenting to decree without her authority; that, if he did so, he would be liable in the expense of reducing that decree; and that his want of authority to act as agent and consent to decree was the only point on which proof could be allowed. They therefore proposed to allow the pursuer a proof before answer regarding this matter; but Lord Curriehill suggested that it was for Mr Grigor's consideration whether he should go into a proof, even although he was certain that the result would be in his favour.

SECOND DIVISION.

HUTTON v. MACFARLANE.—May 15.

Declarator—Diligence.

This is an action of declarator that the pursuer has right to the coal and minerals in the lands of Braes, of which he is superior, and is entitled to insert in any charter or renewal of the original feu-rights to be granted by him in favour of the defender, the proprietor of the *dominium utile*, a reservation of said right, and that the subjects are in non-entry by the death of the last vassal, and by the defender failing to enter himself. The Lord Ordinary (Kinloch), before answer, granted diligence for recovery of the original feu-rights, and also the subsequent titles in the persons of the successive proprietors of the *dominium utile*. The defender reclaimed, and contended that the pursuer was not entitled to a diligence for recovery of the feu-rights prior to the period of prescription. The Court, without calling on the respondent's counsel, adhered.

STRANG v. STEUART.—May 15.

Process—Proof.

In this case, the Lord Ordinary allowed both parties a proof of their averments, and to each a conjunct probation. Proof having been led by the pursuer and defender, circumduction was passed against the defender, and the pursuer was allowed a proof in replication. When this proof was closed, the pursuer asked another proof in replication to this last proof. The Lord Ordinary allowed the defender to lead such further proof as may be competent, reserving all legal objections to the course of examination, or to particular questions.

The Court recalled this interlocutor, on the ground that the pursuer was not entitled to such a proof in replication except on special cause shown, and that in the present case the Lord Ordinary had not considered whether there was ground for granting the motion.

STEWART v. JANE KERR OR NEILSON AND OTHERS.—May 16.

Aliment—Arrestment.

In an action of affiliation, at the instance of Jane Kerr or Neilson, decree was given by the Sheriff of Linlithgowshire against Thomas Crawford, farmer at Limefield, near Bathgate. He brought this decree under review of the Court of Session by suspension, and, being unsuccessful, the decree was confirmed. He then assigned his right to reduce this decree to Abraham Stewart, his cautioner in the suspension, the consideration being the obligation as cautioner. Stewart brings the present action, as Crawford's assignee, for reduction of the decree, with conclusions for damages, and, on the dependence of the process, has arrested in the hands of Crawford the sums due by him to the defender, Jane Neilson, under the Sheriff's decree confirmed by the Court. The Lord Ordinary (Kinloch) at once recalled the arrestments, holding that this was an endeavour to make the reduction operate as a suspension by the device of raising the reduction in name, not of Crawford, but of Crawford's assignee, who arrested in Crawford's hands, and was in substance just Crawford's arresting in his own hands. He held that there was here no legitimate use of diligence, but a mere perversion of its forms to accomplish what the law does not sanction. Stewart reclaimed, and contended that the defender was not entitled to have the arrestments loosed except upon caution. The Court, without calling on counsel for the respondent, adhered to the Lord Ordinary's interlocutor.

STIRLING'S TRUSTEES v. SIR SAMUEL STIRLING.—May 23.

Entail—Improvement Debt—10 Geo. III., cap. 51.

The present action is brought by the late Sir Samuel Stirling's trustees against his heir of entail, for payment of certain improvement debts, under the Act 10 Geo. III., cap. 51, alleged to be constituted by two decrees of declarator in 1835. The pursuer contended that by virtue of the 26th section of the statute, these decrees, not having been appealed within twelve months, were now final. The defender objected (*inter alia*) that both the decrees bore that the sums contained in them had been in part expended in 'repairing farm-houses and offices on the entailed estate,' a disbursement not authorized by the Act as a charge upon the estate. In March last, the Court held that the improvement debts sought to be recovered appeared *ex facie* of the decrees to be composed in part of sums expended in repairing farm-houses and offices on the entailed estate, and that sums so expended were not within the meaning of the statute such a debt as could to any extent form a charge on the entailed estate. Parties were appointed to be heard on the question, whether the sums so expended could be distinguished, and the decrees made effectual for the balance.

At advising, Lord Cowan said that, had the decrees set forth the expense of repairing farm-houses and offices as a distinct and separate item, there might be room for holding that to be a separable part of the sum in the decree; the decree being good for the balance. The decrees, however, did not distinguish the portion of the sum that had been so expended, or specify what portion of the sum had been a statutory and what a non-statutory expenditure. The words, 'conform to accounts and vouchers,' etc., were mere words of customary style, and did not qualify or explain

the previous decerniture, or constitute the accounts and vouchers part of the decree. He was, therefore, of opinion that the decree could not be sustained to any extent.

The other judges concurred.

OUTER HOUSE.

(Before Lord Ardmillan.)

WHITE v. SIMPSON AND SMELLIE.—*May 21.*

Exchequer—Costs.

In this case, the Justices sustained certain preliminary objections to the relevancy of the information, and found the Crown liable in expenses, because on the Crown's side a blunder had been made which caused expenses to the defenders. For the Crown an appeal was taken to the Court of Session as the Court of Exchequer, and the Lord Ordinary in Exchequer has pronounced the following interlocutor, explaining the grounds of it in the subjoined note :—

Edinburgh, 21st May 1862.—The Lord Ordinary in Exchequer causes having heard parties' procurators and made avizandum, and considered the debate, appeal, and whole procedure, sustains the appeal: Finds that the motion made in the Justice of Peace Court, by or on behalf of the respondents, for expenses against the Crown, or against the appellant, William White, an officer of Excise suing on behalf of the Crown, could not be competently granted by the Justices of Peace, and that the same ought to have been refused by the Justices; therefore, recalls the deliverances of the Justices complained of, and decerns: Finds no expenses due to either party in this Court.

JAS. CRAUFURD.

Note.—The question here raised turns on the construction of the 24th section of the Exchequer Act (19th & 20th Vict., cap. 56) as applicable to a prosecution in the Justice of Peace Court, under the 23d & 24th Vict., cap. 114.

The cause in which the Justices, sitting in a Justice of Peace Court, awarded costs against the Crown, was a criminal cause, which was in the course of prosecution at the instance of an officer of Excise on behalf of the Crown. The Crown sought the 'conviction' of persons who were alleged to be offenders against public law, and to be, in terms of the statute, guilty of an 'offence.' It can scarcely be disputed that the proceeding on information for conviction and punishment of such offenders under that statute was a proceeding in a criminal cause. Such cases as the case of *Bruce v. Linton* leave little room for doubt on that point.

But it has been contended by the respondents, that although the cause may have been a criminal cause, yet the Justice of Peace Court, before which the cause depended, was a 'civil court' within the meaning of the 24th section of the Exchequer Act. The Lord Ordinary is of opinion that the plea, though ingenious, is not sound.

The general phraseology of the 24th section of the Exchequer Act is more consistent with the views of the appellant than with this plea of the respondents; and the more minute examination of the terms of the section tends to the same result.

The previous Act of 18th & 19th Vict., cap. 90, in regard to awarding costs against the Crown, did not apply to this case; and the reason was, that that statute related only to causes at the instance of the Lord Advocate or the Attorney-General; and these informations before the Justices are not at the instance of the Lord Advocate, but of an officer of Excise.

In the Act now under consideration (19th & 20th Vict., cap. 56), it is provided that costs may be given for or against the Crown in two classes of causes, specified under distinct heads: 1st, in all causes instituted under the Exchequer Act before the Court of Session as the Court of Exchequer; and, 2d, in 'all causes depending before any civil Court in Scotland.' Now, costs are awarded by Courts and in causes, and the characteristic or descriptive feature of the sphere within which, under both of the above heads, costs can be awarded to or against the Crown, is to be found not in the authority by which costs are awarded, but in the suit in which costs are incurred. In other words, the distinguishing characteristic is a quality of certain 'causes,' not a quality of certain 'Courts.' It is not that certain Courts may competently award costs—it is that, in certain causes, costs may be competently awarded. This, though apparently a mere verbal criticism, is not without importance in this question.

A Justice of Peace Court has a jurisdiction in certain civil causes, and a jurisdiction in certain criminal causes; and with reference to these causes respectively, it may be a civil Court, or it may be a criminal Court. The causes depending before that Court, as a civil Court, can be no other than the civil causes which that Court tries. On the other hand, the criminal causes which that Court tries are just the causes depending before it as a criminal Court, and not as a civil Court. The description of the Court as civil or criminal must thus depend, in so far as regards the present question, on the nature of the causes brought before that Court for decision. It is not a 'civil Court' when it is engaged in trying a 'criminal cause.'

In this case the cause was criminal; and the Court trying that criminal cause, and pronouncing a judgment on the relevancy of the information, according to which the prosecutor sought a conviction, could not, in the opinion of the Lord Ordinary, be correctly described as a 'civil Court' within the meaning of the statute.

There is no authority or precedent in Scotland for the proposition that the Crown can crave costs, or can be decerned to pay costs, in a criminal prosecution before a Justice of Peace Court. So far as the Lord Ordinary is aware, no such award of expenses for, or against, the Crown, has ever been previously pronounced. Whether it would be better that such costs could be awarded, and whether the power to award costs in such causes would be favourable to the Crown, or to the subject, it is out of place here to inquire. As the law stands, under the present statutes, the power to award costs to or against the Crown in criminal causes is not conferred expressly, and cannot be implied.

J. C.

APPEAL IN THE HOUSE OF LORDS.

(Before Lord Chancellor Westbury, Lords Cransworth and Kingsdown.)

ARCHIBALD BUCHANAN, PLOUGHMAN, BATHGATE, *Appellant*; v. ALEXANDER ANGUS, MERCHANT, BATHGATE, AND ANOTHER, TRUSTEES, *Respondents*.—May 13 and 15.

Doctrine of Constructive Conversion—Service necessary to transmit an equitable interest.

This was an appeal against a decision of the First Division of the Court of Session. The late John Smith, writer in Bathgate, by his trust-disposition and settlement, dated 1853, disposed and conveyed all his heritable and moveable estate to trustees for certain purposes. Some of these were to pay debts and legacies, and the fourth purpose was as follows:—‘I direct and appoint my said trustees to pay over the residue and remainder of my means and estate generally above disposed, or the prices and produce thereof, to my brother, Major Smith, residing in Edinburgh, and the said Mrs Margaret Smith or Heugh, my sister, equally betwixt them, share and share alike, and their heirs and assignees whomsoever, with all the rights and securities thereof, which may be vested in my trustees.’ In another part of the deed, he gave power to the trustees ‘to lease the heritable property thereof, or, *if necessary, to convert the same into money—to call, sue for, uplift, and discharge the same, and the interest and profits thereof.*’ John Smith, the truster, died in 1854, without issue, leaving his brother, Major Smith, and his sister, Mrs Heugh, surviving. The testator left property, both heritable and moveable, amounting in value to about L.6000, of which the heritable amounted to about L.2000. The trustees made up titles, and continued vested in the heritable estate. They never exercised the power to sell that estate for the purposes of the trust. Major Smith died in 1855, a year after his brother, the testator. Mrs Heugh was the sole next-of-kin and heir-at-law of Major Smith. She, soon after the Major’s death, executed a trust-disposition, conveying all her property to trustees, the present respondents. She died in 1856. She had never been served heir to her brother, Major Smith.

In May 1857, an action was raised by the appellant, who was the heir-at-law of Major Smith, one object of which was to reduce the trust-disposition of Mrs Heugh, on the ground of facility, fraud, and circumvention; but in that branch of the action the appellant was unsuccessful. The other object of the action was to have it declared, that the one-half of the heritable estate of the late John Smith which had been destined to Major Smith had never vested in Mrs Heugh, and, therefore, was not included in her trust-disposition, and so belonged to the appellant, as heir-at-law of the Major. The trustees of Mrs Heugh defended the action, and contended that whatever interest Major Smith had in John Smith’s residuary estate was a personal right, and passed to Mrs Heugh without any service, and thus was included in her general trust-disposition, and belonged now to her trustees. The question thus raised was, whether the half of John Smith’s property was converted into moveables by the trust-deed, or was a heritable right in the person of Major Smith.

Lord Ordinary Ardmillan held that the *jus crediti* of Major Smith was moveable, and therefore belonged to the trustees of Mrs Heugh. On reclaiming note, the First Division unanimously adhered to this interlo-

cutor. The pursuer thereupon appealed to the House of Lords, and was admitted to proceed *in forma pauperis*.

The LORD CHANCELLOR said that the point which had been raised at the bar of the House as to the right of Major Smith to the half of the real estate of John Smith being transmissible to the heir without a general service had been taken for granted by the Court below. Indeed, it would have been an idle thing for Mrs Heugh's trustees to have contended that the *jus crediti* of Major Smith was moveable on the ground of the trust-deed having operated as a conversion of the property, if such an argument as that now raised for the first time had been tenable; for, if it had been transmissible without a service, that of itself would have constituted an answer to the appellant, seeing that it was admitted that everything, whether heritable or moveable, which had belonged to Mrs Heugh, passed by her trust-disposition. The Court below assumed that if this *jus crediti* was heritable, it did not pass by Mrs Heugh's trust-disposition; indeed, that was the basis of the entire contention of the parties. But even if the Court had not assumed it, there could be no doubt whatever on the state of the authorities that this *jus crediti*, if heritable, remained in the *hæreditas jacens* of Major Smith, for it necessarily partook of the nature and qualities of the subject itself, which was vested in the trustees. A *jus crediti* was in reality nothing else than the estate of the beneficiary or the equitable estate. There was, therefore, no substance whatever in the objection which had been raised at the bar. Then the only question which remained was whether the heritable estate left by John Smith was converted by the will into moveable estate. Now, the rule on that subject was the same in Scotland as in England, and it was this: It was a question of intention or construction. If the terms of the will amounted to an absolute and imperative direction to the trustees to sell the heritable property and convert it into money, or if a discretion was given to sell in certain events, and those events happened, then it was an out-and-out conversion. But if the will amounted merely to a discretion to sell, and that discretion was never exercised, and there was no necessity for so exercising it, then there was no conversion, and what was before heritable still remained heritable. On this subject, Lord Fullerton had expressed the rule in one of the cases cited with singular felicity, for he said, 'if it is not indispensable to the carrying out of the trust to sell the heritable property, then there is no conversion.' Now, in the present case, there was no imperative direction, but it was left to the discretion of the trustees. They had never exercised that discretion by selling. Nor was it all at indispensable. Indeed, all the expressions of the will favoured the view that the testator contemplated that the heritable property would not probably be sold, and he used the language appropriate to such a state of things. The inquiry, therefore, into the intention of the testator, as contained in the trust-deed, clearly led to the conclusion that there was no conversion in this case. There could be no hesitation whatever in coming to that conclusion, and therefore, as the ground of the judgment of the Court of Session entirely failed, it must be reversed, and the cause be remitted with a declaration.

Lords CRANWORTH and KINGSDOWN shortly stated their entire concurrence in this conclusion. Judgment reversed.

DIGEST OF CASES ON APPEALS UNDER THE LANDS VALUATION ACTS (17 & 18 Vict., cap. 91 ; and 20 & 21 Vict., cap. 58).

[In a recent number of this Journal an abstract was given of the results of the decisions of the Valuation Appeal Court, as embodied in the Reports printed by the Board of Inland Revenue, for private circulation. Many of our readers having expressed a desire that the Reports themselves should be made public, we have been induced to issue the following abridgment of the Reports for the last three years. We shall continue the abstract annually, as soon as the Reports are issued.]

OCCUPIERS OF FARM—*Incoming Tenants.*—The farm in question was let to J. and H. Kellas for the space of nineteen years and crops from and after the term of Whitsunday 1858. The rent is L.145, payable at Martinmas and Whitsunday, the first payment at Martinmas 1859, and the next at Whitsunday 1860, for crop and year 1859. They entered to possession of the dwelling-house, farm-offices, natural pasture grass, and turnip land, at Whitsunday 1858 ; but the waygoing tenant retains possession of the land under grain, crop of 1858, until the reaping and separation of the crop from the ground, and the land under sown grass, till the term of Michaelmas 1858. The waygoing tenant reaps the crop of 1858, and pays the rent thereof (L.111), one-half at Martinmas 1858, and the other at Whitsunday 1859. The first grain and sown grass crop which the incoming tenants reap and pay rent for, is 1859. The incoming tenants, Messrs Kellas, were entered in the Roll for the year from Whitsunday 1858 to Whitsunday 1859, as tenants and occupiers of the farm ; and the yearly rent or value of the farm was entered at L.145, the rent payable under their lease. The Commissioners held Messrs Kellas to be properly entered in the Roll as occupiers, and that the present annual value of the farm was L.145. (Commissioners right. Case No. 1, 1858.)

PROPRIETOR—*Squatter.*—A farmer sub-let, without consent of the proprietor, to a party, a small piece of his farm at L.1 a-year. The party has no *feudal title*, and states that he is liable to be removed in any year without compensation or amelioration. He has built a house on the piece of ground, and is entered in the roll as the proprietor and occupier of the house. The Commissioners held that he was not legally in possession as proprietor, and instructed the entry to be deleted. (Commissioners right. Case No. 2, 1858.)

FURNISHED HOUSES.—The fishings and shootings of Inchnacardoch and Cullochry are let, along with the furnished houses of Inchnacardoch and Cullochry, for five years, at a rent of L.420, and the yearly rent or value of these fishings and shootings is entered in the Roll at L.420. A majority of the Commissioners held that a deduction of L.70 as the fair annual value of the furniture should be made, and restricted the entry to L.350. (Commissioners right. Case No. 3, 1858.)

WOODS—*Copse, Underwood.*—The woodlands on the estate of Corsock are entered in the Valuation Roll at L.46, 10s. This charge includes 33 acres of young plantations, and 1½ acres of copse, which the assessor valued according to sec. 6 of the Act, 'at what they might, in their natural state, be reasonably expected to let from year to year as pasture or grazing lands.' The woodlands and copse yield no revenue, and the appellant therefore maintained they could not be included in the valuation, as the interpretation clause of the Act, sec. 42, specified, that the 'lands and heritages' authorized to be valued should extend to and include 'woods, copse, and underwood,' from which *revenue is actually derived*. The Commissioners, by a majority, relieved the appellant of L.11, 7s., effecting to the 33 acres of young plantation, and 1½ acres of copse. (Commissioners wrong. Case No. 4, 1858.)

FARM—*Interest of Money expended on Improvements (Obligation on Tenant to pay not in Lease).*—Subsequent to entering into the lease of the farm, the pro-

prietor expended money on improvements, for which the tenant was to pay interest. The lease contains no obligation on the subject, on either side. The rent of the farm entered by the assessor in the Roll, is the sum in the lease and the interest of the improvement money added together. The Commissioners held that the interest could not be added to the rent, and struck it out of the Roll. (Commissioners wrong. Case No. 5, 1858.)

FARM—*Interest of Money expended on Improvements (Obligation to pay in the Lease).*—The same, excepting that the tenant was bound by the lease to pay interest on such sums as the landlord might expend on improvements. The Commissioners affirmed the assessor's charge. (Commissioners right. Case No. 5, 1858.)

FARM—*Interest of Money expended on Improvements (some of the Improvements not Permanent).*—By the lease, the proprietor was bound to expend L.1000 on fences, drains, and houses, and if not exhausted on these, the balance on lime to be laid on the farm. After the lease, it was arranged that L.800 should be expended on fences, drains, and houses, and L.200 on lime, and L.56 of the L.800 was expended on *sheep drains*. The lime was laid on the pasture as a top dressing. It was afterwards agreed that the tenant should lay out an additional sum of L.100 on houses, to be repaid by the landlord, and when repaid, which it was, the tenant was to pay interest on it. The assessor added the whole interest payable by the tenant, for the money so expended, to the rent in the lease. The appellant maintained that, as the benefit from the money expended on *sheep drains* and *lime* would be exhausted some time before the expiry of the lease, the interest for that money could not be deemed 'rent;' the benefit not being in the heritable subject, the interest could not be rent for the use of it. (The interest on the money for *sheep drains* and *lime* not liable. The rest liable. Case No. 6, 1858.)

FARM—*Drainage Rent-Charge (Obligation on Tenant to pay not in Lease).*—Farm was let by lease of ordinary duration for L.600 of rent. Subsequently a loan was obtained from Government for the drainage of the land, and the tenant agreed to pay the rent-charge for it, amounting to L.105, 13s. 5d., in addition to the rent fixed by the lease. The Commissioners held the rent, with the addition of the rent-charge paid by the tenant, to be the value of the farm, to be entered in the Roll. (Commissioners right. Case No. 7, 1858.)

FARM—*Interest on Improvement Money (Obligation on Tenant to pay not in Lease).*—1st Case. Subsequently to the lease, the landlord agreed to advance, from his own funds, sums for the improvement of the farm and mill, by draining, etc., on condition of the tenant paying, along with his rent, $6\frac{1}{2}$ per cent. of interest on the outlay. The assessor added this interest to the rent payable by the lease. The appellant maintained that only the excess of the $6\frac{1}{2}$ per cent., payable by the tenant above the ordinary rate of interest on loans, viz., $2\frac{1}{2}$ per cent., should be regarded as rent.

2d Case. The landlord, by the lease, agreed to give a sum for drainage of the farm, for which the tenant should pay $6\frac{1}{2}$ per cent. of interest, and also to lay out a considerable sum on buildings, etc., without charge to the tenant. The proprietor got a higher rent in consequence of these stipulations. The assessor added the interest payable by the tenant, for the sum for the drainage, to the rent. The landlord maintained that only $2\frac{1}{2}$ per cent. for the drainage, and 1 per cent. for the expenditure on the buildings, and not the whole increased rent, should be regarded as rent. The Commissioners refused the appeal in both cases, thereby confirming the charge of the assessor. (Commissioners right. Case No. 8, 1858.)

FARM—*Interest on Improvement Money (in some cases obligation on Tenant to pay in Lease, and in others not).*—The proprietor, in some cases, in the leases, and others by agreements subsequent to the leases, agreed to lay out money in improvements on various of his farms. Generally, the money was to be applied in draining, fencing, and erecting houses—in one case a steam engine, threshing

machine, and oats-bruise. In another case, the advance was to be applied in the purchase of lime. Various other sums were advanced by the landlord, for which the tenant was *not* to pay interest. All the interest paid by the tenants for the sums expended and advanced were added by the assessor to the rents of the respective farms, excepting the interest of the sum for lime. The proprietor maintained that the interest could not form part of the rent—that a higher rent was got for the farms in the cases where the advance was stipulated for in the lease, and so the rent included any increased value of the land, and if the interest was added to the rent, the increased value would be twice charged. The Commissioners sustained the appeal. (Commissioners wrong. Case No. 9, 1858.)

VALUE OF LAND—*Rent of Grazings*.—The appellant is proprietor of two farms, part of which he has laid down in grass, and the other part is in a course of cropping and cultivation with a view to be brought into grass. The appellant stated that he was at great expense in raising fine crops of grass, and, in consequence, he got a high price for the grazings for the season. When the grazings are let, he is also at the expense of taking charge of the stock and repairing fences. The expense of weeding and repairing ditches was also an annual charge. The appellant let the season's grazings on the greater part of the grass land of his farms this year, and the assessor intends to charge, under the entry 'land let for less than a year,' the actual rent got as the value of that part of the land, and he has also charged, under the entry 'part of two farms in proprietor's possession,' the value of the portion of the land which, by rotation, was under crop. The Commissioners found, by a majority, that the grass lands let for less than a year should be held to be in the occupation of the proprietor, and that the value of such should be the rent at which, one year with another, they might reasonably be expected to bring, if let for ordinary agricultural purposes. (Commissioners right. Case No. 10, 1858.)

VALUE OF LAND—*Rent of Grazings*.—Similar to the preceding. (Decision the same as in No. 10. Case No. 11, 1858.)

VALUE OF LAND—*Rent of Grazings*.—Similar to No. 10, with the exception that the lands were laid down in grass at considerable expense, and are maintained at considerable expense, apparently not by being broken up and cropped and laid down again in grass, but by top dressing at intervals of years, greater or less. (Decision the same as in No. 10. Case No. 12, 1858.)

OCCUPIER OF FARMS—*Outgoing and Incoming Tenants, Rent*.—The Roll is for the year from Whitsunday 1859 to Whitsunday 1860. The *outgoing* tenant's lease expires at Whitsunday 1859, as to houses, grass, and fallow, and the separation of crop 1859 from the ground as to the arable land. He has right to farm accommodation to manufacture the crop, and he pays the whole rent for crop and year 1859, which is partly grain, convertible according to the highest fiars prices of the year, and is payable at Candlemas and Lammas after reaping (1860). The *incoming* tenants enter to the farms when the outgoing tenant leaves, and pay the whole rent for crop and year 1860. It is partly grain, convertible according to the highest fiars prices of the year, and is payable at Candlemas and Lammas after reaping (1861). The prices for the conversion of the grain are subject to a *maximum* and *minimum* in both cases. The Commissioners held that the *incoming* tenants should be entered in the Roll 1859–60 as tenants and occupiers of the farms, and the money and grain rent, payable by them for crop and year 1860, should be entered in the Valuation Roll for the year in question as the value of the farms, the grain being converted according to the fiars of crop 1858. (The Commissioners' determination modified to the extent of finding that the mean amount of the rents payable by the outgoing and incoming tenants should be entered as the value of the farms. Case 13, 1859.)

OCCUPIER OF FARMS—*Outgoing and Incoming Tenants, Rent*.—Similar to the preceding. (Decision the same as in No. 13. Case No. 14, 1859.)

PROPRIETOR—Crofter (*House built by Crofter subsequent to Entry*).—Lord Lovat let to the appellant, for nineteen years, a croft of land, at a rent of L.8, which was the full value at the time. The appellant had since erected a house on the croft at his own expense, one end of which he occupies as a dwelling-house, and the other as a carpenter's workshop and a shop for the retail of petty groceries. There was no house on the croft at the time he entered to it. The appellant is entered in the Roll as proprietor of the house on a value of L.8. The Commissioners held that the appellant was in possession of the house as proprietor in the sense of the Act. (Commissioners wrong. Case No. 15, 1859.)

LEASE—Grassum, Consideration.—Sir George Macpherson Grant, Bart., appealed against an entry in the Valuation Roll of the farm of Killyhuntly, of L.177, 10s., and claimed to have the entry restricted to L.155, in respect that that is the rent according to the lease. The farm was let on a lease of fifteen years from Whitsunday 1848, at a rent of L.155. By minute, in 1849, on the back of the lease, the endurance is extended to a period of nineteen years from Whitsunday 1850, and in respect the tenant had erected a dwelling-house, it is agreed that he should receive from the appellant at the end of the lease L.450. The assessor added the interest of this sum (L.22, 10s.) to the rent by the lease, on the ground that the tenant in effect paid that as additional rent. (The determination of the Commissioners varied. The subjects should be valued as they now exist irrespective of the lease. Case No. 16, 1859.)

MACHINERY (*fixed or attached*) (*Steam Engine*).—The appellant is charged for 'engine and engine-house, L.90, 5s.,' against which he appealed, and craved that the assessment should be restricted to L.30, the value of the engine-house. The engine is a steam engine, and the appellant maintained it did not form part of the heritable subject, but was moveable. The Act, sec. 42, provides that lands and heritages shall include 'all machinery fixed or attached to any lands or heritages.' The Commissioners reduced the valuation to L.30. (Commissioners wrong. Case No. 17, 1859.)

CANAL—(Houses and Lands acquired, but not now used for the undertaking).—The Forth and Clyde Navigation Company are charged by the county assessor for certain houses and lands originally acquired for the undertaking of the company, the houses having been used for the accommodation of their servants; but for some years they have not been so, and have been let to strangers on the ordinary footing of landlord and tenant. The railway and canal assessor has included the rents in question in the valuation of the canal. The assessor maintained the subjects did not at present form part of the undertaking of the company, and were not in their occupation. The Commissioners sustained the appeal. (Commissioners right. Case No. 18, 1859.)

RAILWAY (*Feuars having way-leave of*).—The appellants are feuars of lands on which are Langloan Ironworks. In the feu contract the perpetual right and servitude of using a railway, and the use and servitude of ground to double it, are granted to them. They are to maintain the railway. For this servitude and privilege, they are to pay the yearly rent or sum of L.50; but if the superior or his tenants use the railway, the yearly rent or payment is to be reduced. The feu contract makes provision for the railway being sold by the superior to a public company. The subject is entered in the Valuation Roll as 'Way-leave Railway;' the superior as proprietor; and the appellants as tenants. The Commissioners held that the railway was assessable, and the entry in the Roll was in due form. (Commissioners right; but the appellants should be entered as 'occupiers.' Case No. 19, 1859.)

RENT (L.19, 19s. *The Commissioners considered this the full and fair rent*).—The appellants appealed against the assessor's entry of the value of a house at L.20, on the ground that L.19, 19s. was the actual and full and fair rent of the premises. The assessor said that it was obviously a L.20 house, and he considered it worth that sum. The Commissioners considered L.19, 19s. the full and fair

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rent of the premises, and appointed that sum to be entered in the Roll. (Commissioners right. Case No. 20, 1859.)

NEW LEASE—Rent Increased.—The Valuation Roll is for the year from Whitsunday 1860 to Whitsunday 1861. The new lease is for nineteen years, and crops from and after Whitsunday 1859, and the farm is arable. The *first* year's rent under the new lease is L.130, payable half-yearly, the first half at Martinmas 1860, and the other at Whitsunday 1861. The *second* year's rent under the new lease is L.170, payable half-yearly, the *first* half at Martinmas 1861, and the *second* at Whitsunday 1862, and so on during the remaining years of lease. The assessor entered the *second* year's rent under the new lease in the Valuation Roll for the above year (L.170, less 4s. 6d. of a deduction), and the Commissioners confirmed the assessment. (Determination of the Commissioners wrong; the rent to be entered in the Roll should be L.149, 17s. 9d.—the mean between the rents of the 1st and 2d years of the lease. Case No. 21, 1860.)

OCCUPIER OF FARM—Outgoing and Incoming Tenants—Rent Increased.—Two cases the same as the preceding, excepting that the occupants are new tenants, whose leases are for nineteen years, and crops from Whitsunday 1860, the rent payable half-yearly, the first half-year's rent at Martinmas 1861, and the second at Whitsunday 1862. Arranged by the parties, that the decision in the preceding case should regulate their cases. (The mean between the rents under the old lease and the rent under the new lease should be entered in the Roll. Case No. 21, 1860.)

OCCUPIER OF FARM—Outgoing and Incoming Tenants—Rent Increased.—Similar to the immediately preceding. (Decision the same as preceding. Case No. 22, 1860.)

OCCUPIER OF FARM—Grain Rent—Outgoing and Incoming Tenant.—The Valuation Roll is for the year from Whitsunday 1860 to Whitsunday 1861. The incoming tenant's first crop is that of 1860, and the rent is partly grain, convertible by the fiars—not struck until March 1861. The assessor entered the incoming tenant in the Roll, and the rent according to his lease, but the grain rent calculated according to the fiars of crop 1859, struck March 1860. The Commissioners affirmed the assessor's valuation. (The Commissioners right. Case No. 23, 1860.)

COAL—Fixed Rent L.300 or Lordship (Landlord took Lordship preceding year, though less than the fixed Rent).—Coal-mine let on lease for a period less than thirty-one years. The rent is L.300, or in the landlord's option a lordship. The fixed rent of L.300 is entered in Roll. For the preceding year the landlord accepted L.188, 6s. 10d., being the lordship in full of the rent for the year; and the appellant craved that that sum should be entered in the Roll for the present year, on the ground that if the lordship had exceeded the fixed rent, the amount of the lordship for the preceding year would have been entered in the Roll. It is not said that the appellant would accept of the lordship for the present year. The Commissioners reduced the rent to L.188, 6s. 10d. (The Commissioners wrong. Case No. 24, 1860.)

SALMON FISHINGS (If Rent by Lease fair Annual Value).—The salmon fishings in the sea, *ex adverso* of the Brotherton estate, were let for a number of years by Mr Scott, the proprietor of Brotherton, while the fishings were regarded as his, to Mr Hector, at a rent of L.25. The House of Lords decided that they belonged to the Crown, and Mr Scott obtained a lease of them from the Crown for three years, at a rent of L.14. The assessor entered Mr Scott in the Roll as proprietor, and the value of the fishings, L.25. The Commissioners directed the Crown to be entered as proprietor, and Mr Scott as tenant, at the rent of L.14. (The fishings not let to Mr Scott at the fair annual value. Mr Hector's rent of L.25 a good test of value. Case 25, 1860.)

FARM RENT—(Rent above a certain sum to be laid out in Improvements on Farm).—The rent of the farm is made up *inter alia* of 100 bolls of oats at the

highest fiars prices of the county of Wigtown ; and it is provided, that when the fiars exceed 28s. per boll, the tenant shall be entitled to claim the amount which the grain rent may exceed L.140, but such amount he must expend in building houses and in opening drains on the farm. For the present year the fiars prices were such as to bring this part of the lease into operation ; but the landlord maintained that he did not receive more than L.140 of the grain rent of the farm, and no more than that sum should be entered in the Roll in respect of the grain rent. The Commissioners held that the sum payable by the lease, including the whole grain rent, should be entered in the Roll. (The Commissioners right. Case No. 26, 1860.)

GLEBE—Quarry (*Practice as to Valuing Mines*).—Granite quarry, in the Glebe of Kirkmabreck, is worked by the Liverpool Dock Commissioners. They pay tonnage or lordship of from 1s. to 3d. per ton. Ninety per cent. of the returns forms an accumulating fund under the management of a committee of heritors, and the interest of that fund is paid to the minister of the parish. He receives the remaining 10 per cent. as a compensation for the inconvenience and annoyance from the working of the quarry.

The minister, heritors, and presbytery of Wigtown, objected to the quarry being valued at all, as a glebe is an inalienable subject, and the tonnage is the price paid for a portion of the glebe carried away ; but if valued at all, it should be entered in the Valuation Roll at no more than the 10 per cent. paid to the minister. The heritors of Kirkmabreck and presbytery of Wigtown are entered in the column of 'Proprietor' in the Roll, and the sum paid by the Dock Commissioners last year is entered as the value for the current year.

The Commissioners held that the quarry was correctly entered in the Roll. (Right, adding in the column of 'Proprietor,' the words 'as holding in trust for the benefice of Kirkmabreck.' Case No. 27, 1860.)

RENT (L.19, 5s. ; but Tenant, by Lease, to Insure the Premises).—The appellant has a lease of the inn and farm of Monymusk for twelve years. By the lease the rent of the house, yard, and offices is L.19, 5s., and the land, L.126.

When the house-duty was first imposed in 1851, the inn was charged on L.30 of annual value. On appeal it was reduced to L.20, which has continued ever since. The inn and farm was then let as one subject, at L.141, 5s. of yearly rent.

The assessor has entered in the Roll the inn at L.20, and the farm at L.125, 5s. It appeared from a copy of the lease transmitted by the Commissioners, that the tenant was bound to keep the premises insured to the extent of L.600. The Commissioners decided that the lease should regulate the entries in the Roll, viz., L.19, 5s. for the inn, and L.126 for the farm. (Wrong, in respect that by the lease the subjects are let, not merely for the money stipulated for, but for the further consideration of the tenant insuring the premises. Case No. 28, 1860.)

PROPRIETOR—Crofter (*House built by Crofter subsequent to entry*).—Lord Lovat let a croft of land for nineteen years at the rent of L.8, 10s., which was the full annual value at the time. The crofter had since erected a house on the croft at his own expense, one end of which he occupies as a dwelling-house, and the other as a carpenter's workshop and a shop for the retail of petty groceries. There was no house on the croft at the time of entry under the lease. The assessor entered Lord Lovat as proprietor of the croft and house at the value of L.14, 10s. The Commissioners held that L.8, 10s. was the rent or value of the subjects in terms of the Act. (The Commissioners right. Case No. 29, 1860.)

MILLS AND FACTORIES—Mansion Houses.—The appellants are owners of a silk factory at Govan, Glasgow, which is valued by the assessor at L.497. The appellants alleged, that if the factory were valued on the same principle as the assessors value mansion-houses—which principle was, what they would rent at from year to year—such factories as theirs would be entered at nothing, as no

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one would fit up machinery upon a letting from year to year. The assessor charged factories at a certain per centage on the cost, which the appellants objected to, unless mansion-houses were assessed on the same principle. The assessor maintained that it was not competent for the Commissioners to entertain the appellants' objection to the valuation of their factory, which was not that it was too high, but that other kinds of heritages in other parts of the country were too low.

The Commissioners, not regarding the valuation as beyond the fair annual value of the subjects, refused the appeal. (The Commissioners right. Case No. 30, 1861.)

WOODS—Shootings Let.—The Lord Forbes is assessed for the woods and plantations forming part of subjects in the parishes of Auchindoir and Tullynessle and Forbes. His lordship has let the mansion-house of Littlewood Park, and the shootings over his whole farms, plantations, and moor-grounds in the above parishes. The plantation and moor-grounds were not to be let to tenants for pasture, nor was grass-cutting to be allowed.

The appellant maintained that the value of the ground as pasture was included in the rent for the shootings, as he had to abandon the right to let for pasture in order to get a higher shooting rent.

The assessor maintained that there are two distinct subjects charged by the Act—woods according to their value for grazing in their natural state, and shootings when let. Both subjects and values exist in the present case. The shooting rent is in addition to the grazing value of the subjects—as in the case of agricultural rents—where there is a shooting rent when the shootings are let in addition to the agricultural rent.

The Commissioners relieved the appellant. (The Commissioners wrong; but in respect Lord Forbes is not sole beneficial occupant, he should be charged with only two-thirds of the value. Case No. 31, 1861.)

SALMON FISHINGS IN RIVER.—The salmon fishings of Knoydart are entered at L.10. They were in the proprietor's own occupation, and were never let in so far as he knew. He alleged they were worthless; but maintained, that according to the 42d section, it was only in the case of revenue being derived from them that they are to be included among lands and heritages for valuation.

The assessor stated that the fishings had been let to a tenant some years ago, and had also been let with the shootings. But he maintained that the provision as to revenue being derived applied to copse and underwood, and not to fishings.

The Commissioners directed the entry to be struck out. (The Commissioners wrong. Case No. 32, 1861.)

MINERAL LEASE FOR TWENTY-ONE YEARS—Sublet for Increase of Rent.—Certain minerals belonging to appellant are valued at L.311, 3s. They are let to Barclay on lease for twenty-one years, at a rent of L.200, and Barclay underlet them to Dixon and Co. for L.311, 3s.

The Commissioners held the rent, and not the sub-rent, to be the criterion of yearly value, and restricted the valuation accordingly: and that the principal tenant ought to be taxed on the difference between the rent and sub-rent; but for this there was no provision in the statute, excepting in the case of leases of upwards of thirty-one years; and so in the case of leases of ordinary duration, surplus rent actually paid is lost for assessable purposes. (The Commissioners right. Case No. 33, 1861.)

SALMON FISHINGS IN THE SEA—Skores—Proprietor—(Let by Crown, but not at fair annual value.)—Mr Scott of Brotherton appealed against being entered as proprietor of the salmon fishings in the sea, *ex adverso* of the Brotherton estate, at the value of L.25.

The fishings were formerly regarded as belonging to him; but the House of Lords decided that they belonged to the Crown. Mr Scott obtained a lease of them from the Crown for three years at a rent of L.14, but he had let them

while he was regarded as proprietor of them at a rent of L.25, and they were still sublet at that rent by him. The judges in the Case No. 25 held that they were not let by the Crown to Mr Scott at the fair annual value, and that the sub-rent of L.25 was a good test of the value. The appellant maintained that the rent above L.14 was got for the use of the shores and other conveniences, which belonged to him, for carrying on the fishings, and therefore that his lease was for a *bonâ fide* rent. Accordingly, he was willing to be entered as proprietor for the rent above L.14.

The Commissioners directed the Crown to be entered as proprietors, and the rent to be entered at L.25.

N.B.—The Commissioners stated that the decision in this case would decide nine other cases. (The Commissioners right. Case 34, 1861.)

LEASE OF FARM—(*If Lease for fourteen years and a Life, having endured more than twenty-one years, be a Lease above twenty-one years.*)—The appellant is entered as proprietor of the farm of Banchor, and the value is entered at L.150. He became tenant of the farm at Whitsunday 1835, under a lease from Miss M'Pherson of Belleville, at the rent of L.92, the terms of the lease being for the space of fourteen years and the life of the appellant. The appellant has already had possession under the lease for upwards of twenty-six years; and the assessor maintained that the appellant must be held as proprietor, on the ground that the stipulated endurance of the lease is above twenty-one years, or on the ground of being liferenter.

The Commissioners directed Miss M'Pherson to be substituted for the appellant as proprietor, and the value to be stated at L.92. (The Commissioners right. Case No. 35, 1861.)

Correspondence.

CHAIR OF CIVIL LAW.

To the Editor of the Journal of Jurisprudence.

SIR,—There is an impression abroad that none of the candidates for this Chair has any right to get it. They are all excellent men, and may have a good knowledge of the subject, but the misfortune is that they have never done anything to prove it. The Faculty is in a fix between confessing that they have nobody fit for the office, and the risk of filling it with incompetence. In these circumstances, various suggestions have been made for helping them out of the difficulty.

1. The proposal to go to England, or elsewhere furth of Scotland, for a Professor, I look upon as simply absurd. The class is introductory to the Law of Scotland, and the Professor must have a competent knowledge of both systems.

2. It is said, 'Of course none of us know very much about Civil Law, because there is no temptation to devote ourselves to its special cultivation; but let us appoint the man best able to get it up in, say, a couple of years or so.'

This is a very feasible suggestion; and, if it is to be acted on, the appointment must be given to a man who can read French and German fluently, and is acquainted with Civil Law as at present taught in the great continental schools. A mere facility in reading the Latin works of Voet, Vinnius, and the Dutch commentators, will no longer do. One who is familiar with the writings of Domat, Puchta, Savigny, and Vaugeroud, would look upon a Professor who required to rely on these old Scotch favourites, with unmitigated contempt. Therefore, a reputation for mere classical scholarship, standing by itself, ought not to secure the appointment.

But though there are many men in the Faculty whose appointment would be a perfectly *safe* measure, there is a strong prejudice against academical offices which prevents them coming forward. Somehow a Professor, be he the most learned of men, is never anything but a Professor. He is never made a Judge or a Sheriff. Agents look upon him as having a sort of divided allegiance; and the business for which he is so well qualified passes his door, to a counsel who can give his *whole* time and attention to his practice.

Now, what seems to me to be wanted, in the present posture of affairs, is something that will modify, as far as possible, this latter objection to taking the office, and at the same time give full opportunity to the new Professor, of getting the subject thoroughly up. This can only be done by dividing the chair and its emoluments among three or more persons,—one taking, for example, the History of the Roman Law and Roman Process; another the Roman Law of Persons and of Succession; a third the Roman Law of Contracts and Obligations. Their duties, if confined to the delivery of a dozen lectures or so, would not interfere with their practice, and the attempt to master their several departments would not be such a desperate effort as the getting up of the whole of the Civil Law, in the mode in which it must be taught in such a school as the University of Edinburgh. If it takes ten men to make a pin, why should it not take three to prepare a good course of lectures on so vast a subject? The Germans do things in this way, and that is the reason of their great success. Where we have only one Professor they will have at least a dozen, every one of them with the subject so completely at his finger ends, that he will lecture for hours at a time without a single note. At all events, I submit that if a permanent arrangement of this kind cannot be effected, the Chair for some years ought to be put into commission in the mode proposed.—I am, etc.

A COUNTRY BROTHER.

English Cases.

FOREIGN BILL.—The duty of cancelling the stamp affixed to a foreign bill of exchange is equally imposed both on the holder and the transferee of such a bill by 17 and 18 Vict., c. 85, sec. 5. Where, therefore, defendant sold to plaintiff a number of foreign bills of exchange, of which the stamps were not cancelled, both parties being ignorant of the deficiency at the time of the transfer, it was held, *per Erle, C. J., and Keating J. (dissentiente Williams, J.)*, that on discovering the mistake, plaintiff could not recover from defendant the price paid for the bills, as upon a failure of consideration, both parties being equally in fault. The claim to have the money returned was not made till more than a year after the sale of the bills took place; and it was held, *per Curiam*, that even had the action lain, the plaintiff had lost his right to maintain it by reason of the delay. *Semble*, *per Williams, J.*, that if the bills had been returned to the defendant, he might as holder have sued the acceptors, though he might have been unable to transfer the bills so as to have made them available in the hands of another person. In that case, I think that, in truth, the defendant is merely remitted to the condition of being the holder of the bill, of which, by reason of his own neglect to cancel the stamp, he has, in the result, never legally ceased to be the holder. And no injustice is done to him thereby, if he is so remitted without any injurious delay. In the present case, however, I agree with the rest of the Court in thinking that the action is not maintainable, because the vendee of the bill neglected, for an unreasonable time, to return it to the vendor.—(*Pooley v. Brown*, 31 L. J., C. P. 134.)

ATTESTATION.—Where the attestation clause was written by the testator, and read over and acknowledged by him in the presence of the two attesting wit-

nesses, before they subscribed their names, and his name in the body of the attestation clause was the only signature to the will, the Court held that the will was duly executed. Sir C. Cresswell: I think I must treat the name of the deceased, as written by him in the attestation clause, as his signature, under the circumstances, he having called on these persons to attest. That is a proof that he intended it as his signature, and that the clause that follows must be considered as a memorandum of what he considered to be the effect of his will. I shall, therefore, grant probate.—(*In the Goods of Walker*, 31 L. J., Pr. 62.)

INFANT.—To a declaration for goods sold and delivered, defendant pleaded infancy, to which plaintiff replied, on equitable grounds, that, at the time of contracting the debt, defendant, knowing his true age, falsely and fraudulently represented that he was of full age, whereby plaintiff (having no knowledge and means of knowledge as to the defendant's age) was induced to enter into the contract and supply the goods. Replication held bad as a departure; and also as not alleging facts to avoid the defendant's plea, on equitable grounds, within the 85th section of the Common Law Procedure Act, 1854. Cockburn, C. J.: It may well be that, in respect of the fraud, equity would have afforded some sort of relief, but that is simply relief founded on the ground of fraud; and in all the cases which were or can be cited, the suit was against the infant in respect of the fraud. It appears to me, therefore, clearly, that the decisions in equity do not touch the matter, nor show that fraud is an answer to a plea of infancy, which, both in law and equity, is a defence to any proceeding on the contract.—(*Bartlett v. Wells*, 31 L. J., Q. B. 57.)

RECEIVING STOLEN GOODS.—A wife, in the absence of her husband, and without his knowledge, received stolen goods, and paid money on account of them. The thief and husband afterwards met. The latter then learnt that the goods were stolen, and he agreed on the price which he was to pay for them, and paid the balance to the thief; and it was held, that, on these facts, the husband might be convicted of receiving the goods, knowing them to be stolen.—(*R. v. Woodward*, 31 L. J., M. Ca. 91.)

ALE AND BEER HOUSE.—Although, under 9 Geo. IV., c. 61, justices have a discretion as to whether they will grant licenses to persons keeping, or about to keep, inns, alehouses, and victualling-houses, to sell exciseable liquors, that discretion must be exercised in a reasonable manner; and, therefore, justices cannot by a general resolution determine not to renew the licenses of all such persons who shall not consent to take out an Excise license for the sale of spirits in addition to the license for the sale of beer.—(*R. v. Sylvester*, 31 L. J., M. Ca. 93.)

CHARTER-PARTY.—By a memorandum of charter-party, dated London, the 19th of October 1860, plaintiff's ship was chartered to defendant as follows: 'It is this day mutually agreed between A. B., owner of the good ship or vessel, called the M., of 420 tons, or thereabouts, now in the port of Amsterdam, and J. B. of London, merchant, that the said ship, being tight, staunch, strong, and every way fitted and ready for the voyage, shall, with all possible despatch, proceed direct to Newport, Monmouthshire,' etc. On the 15th of October, the ship was at N., and, under favourable circumstances, would have reached the docks at Amsterdam in twelve hours more; but, in consequence of wind and the absence of steam-tug power, she did not reach the docks till the 23d of October. She discharged her cargo with all possible despatch, was immediately made ready for sea, and without any delay sailed on the 16th of November, and proceeded direct to Newport; where she arrived on the 1st of December. Defendant refused to load the ship as he had engaged to do by the charter-party. In an action brought against him for such refusal, it was held, by Cockburn, C. J., Crompton, J., and Mellor, J., in accordance with *Dimech v. Corlett*, 12 Moore, Bl. Ca. 199, that the words, 'now in the port of Amsterdam,' did not amount to a condition precedent, and that the plaintiff was entitled to recover: by Wightman, J., in accordance with *Ollive v. Booker*, 17 L. J., Ex. 21, that as

the ship was not in the port of Amsterdam, as alleged in the charter-party, the defendant was entitled to succeed.—(*Behn v. Burness*, 31 L. J., Q. B. 73.)

SPECIFIC PERFORMANCE.—Where, by reason of one of several vendors becoming of unsound mind before the purchase-money is paid, a suit for specific performance becomes necessary, no costs of the suit will be given on either side.—(*Cresswell v. Haines*, 31 L. J., Ch. 237.)

MANSLAUGHTER.—A young woman, who was eighteen years of age, and unmarried, and who usually supported herself by her own labour, being pregnant, and about to be confined, returned to the house of her stepfather and mother. The girl was taken in labour (the stepfather being absent at his work). The mother did not take ordinary care to procure the assistance of a midwife, though she could have got one, had she chosen; and in consequence of the want of such assistance, the daughter died in her confinement. There was no evidence that her mother had any means of paying for the services of the midwife. It was held, there was, under the circumstances, no legal duty on the part of the mother to call in a midwife, and consequently no such breach of duty as to render her liable to be convicted of the manslaughter of her daughter.—(*R. v. Shepherd*, 31 L. J., M. Ca. 102.)

TRUST FOR CREDITORS.—J. M., a trader, executed a deed of insolvency, and directed the inspectors to manage and get in his estate, and divide the same by instalments for the benefit of his creditors. It recited that J. M. owed W. and Co., on a bill of exchange, L.1218, and that they had taken proceedings in bankruptcy, but that the same had been abandoned on the guarantee of some of the persons who were appointed inspectors to pay the amount found due on the bill by arbitration. Among his creditors were W. and Co. for L.3336, for a trade debt. The deed provided, among many other things, that the inspectors might do all necessary acts for carrying into effect the arrangement respecting the L.1218 bill, and should pay W. and Co. whatever might be found due; there were also provisions for the indemnity of the inspectors, and for contributions by the creditors for the same. W. and Co. executed the deed for the debt of L.3336 only. Before the estate was wholly realized, the first instalment became due, and an award was made in favour of W. and Co. for the amount claimed on the bill of exchange. The inspectors, not having money in hand, borrowed money on their own responsibility, and paid the whole L.1218 awarded. The estate turned out to be insufficient, and the inspectors filed a bill against the creditors who had executed the deed for contribution. A decree was made at the Rolls in the plaintiffs' favour, and an account was directed against the several defendants in respect of their several debts in the pleadings mentioned. W. and Co. appealed; and, on appeal, it was held (by declaration), that W. and Co. stood, in respect to the bill of exchange, as mere strangers to the deed, and that they were liable to contribute in respect of the debt of L.3336 only.—(*Cheesebrough v. Wright*, 31 L. J., Ch. 226.)

DIVORCE.—A husband who consents that his wife should leave his house and take up her residence with a paramour, because she refuses to comply with his desire that she should give up the improper intimacy, is not guilty of connivance. Sir C. Cresswell: By connivance I understand the willing consent of the husband; that the husband gives a willing consent to the act, although he may not be an accessory before the fact; that although he does not take an active step towards procuring it to be done, he gives a willing consent and desires it to be done. What the man desired was, not that the act should be done, but that she should not torment him by keeping up an intimacy with this character and at the same time living with him as his wife, and that she should give up the one or the other.—(*Harris v. Harris and the Queen's Proctor*, 31 L. J., Pr. and M. 69.)

SUCCESSION DUTY.—The words of section 17 apply to all contracts, and exempt them from duty; and the funds of a tontine becoming divisible are within that

section, so that the Crown is not entitled to duty; such division, however, would not affect any devolution or disposition after the commencement of the Act. In the case of a father who had subscribed for one share in the tontine in the names of his three infant children, two of whom died before the Act came into operation, the Court decided that there was no succession at all in the surviving child, who took in his own right only that which had been given to him before the Act came into operation. Lord Justice Turner: The 17th clause of the Act is to the following effect:—‘That no policy of insurance on the life of any person should create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured; and no bond or contract made by any person *bona fide* for valuable consideration in money or money’s worth, for the payment of money or money’s worth after the death of any other person, should create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same should be made; but that any disposition or devolution of the money payable under such policy, bond, or contract, if otherwise such as in itself under the Act to create succession, should be deemed to do so.’ We have here, therefore, a distinct enactment that a contract *bona fide* for valuable consideration, in money or money’s worth, for the payment of money or money’s worth after the death of another person, shall not create the relation of ‘predecessor’ and ‘successor’ between the contracting parties; and it is clear that the duty cannot attach in respect of what arises simply and merely from the contract; and that this was what was intended by the Legislature, is, I think, more plain when it is observed that strict provision is made for the duty attaching upon any disposition or devolution of the monies payable under the contract, thus pointedly marking the distinction between the disposition created by the contract and the disposition of the monies payable under the contract.—(*Oldfield v. Preston*, 31 L. J., Ch. 256.)

SPECIFIC PERFORMANCE.—A shareholder in a public company applied to the directors for an allotment of new shares, which they were authorized to issue, and signed an undertaking to accept the same or any less number that might be allotted to him, to pay the calls thereon when due, and to sign the articles of association when required. The shares applied for were duly allotted; and in the notification of allotment he was informed that the articles of association must be signed by him, and in default thereof the shares and deposit would be forfeited to the company. The articles of association contained no clause authorizing the forfeiture of the shares for such a cause. The allottee having refused to sign the articles of association, or to pay the calls which were from time to time made upon the shares, the company filed a bill for specific performance of the undertaking contained in his application for the shares; but it was held, on appeal, that the contract had been varied by the notification of allotment, and that the bill could not be sustained. The company having delayed filing their bill for two years after the allottee’s refusal to sign the articles, it was held, on appeal, that such delay was not in itself fatal to the plaintiff’s case. The Lord Chancellor observed, that he knew of no case, nor did he think it a doctrine that would be warranted by any kind of reason, that when there was a contract capable of being specifically performed, concluded, say, on the 5th of March 1859, and followed up by repeated applications for the performance of that contract by the party who then sought to enforce it—the first application being on the 13th of May 1859, and the second in March 1860, besides other applications alleged in the bill without date, and the bill itself being filed on the 8th of May 1861—there was any delay or acquiescence, on the part of the plaintiff, that should disentitle him to the interposition of this Court, if it were in other respects a fit case for specific performance.—(*The Oriental Inland Steam Company (Limited) v. Briggs*, 31 L. J., Ch. 241.)

PARTNERSHIP.—A firm was established to work a mine; each partner, after notice, was to be at liberty to sell his share, which the continuing partners were

at liberty to purchase. The first partner gave notice to sell his share; the second partner afterwards became a confirmed lunatic; and the third partner then purchased the share of the first, and filed his bill for a dissolution of the partnership. The committee of the lunatic then filed a cross-bill, and insisted upon the clause of pre-emption, and a right to participate in the purchase. It was held, the partners ought not to be compelled to carry on business with a lunatic or his committees; that the partnership must be dissolved; that notice of sale by one partner to the other before his lunacy was sufficient to bind his committees, and determine any right of pre-emption; but that the real value of the undertaking could only be ascertained by a sale of the whole as a going concern. The Master of the Rolls: The difficulties are these:—It is impossible for the Court to compel a party to carry on a partnership with the committees of a lunatic if he is to bear his share of the expense, or have a voice in the management, should there be any contest between them, to have every question determined contentiously in the Court of Chancery, with the chance of an appeal. I will venture to say, that if a share in a mine were to be put up for auction, with the information that it was to be carried on in partnership with the committees of a lunatic, nobody would bid for it.—(*Rowlands v. Evans*, and *Williams v. Rowlands*, 31 L. J., Ch. 265.)

TRUST AND TRUSTEE.—A bill was filed by a married lady, by her next friend, seeking the removal of a trustee of her marriage settlement, under the trusts of which she was entitled for life to the third part of the property settled, on the ground of dissensions between them, so that it was impossible they could act harmoniously together, and the Master of the Rolls made a decree for the removal of the trustee and the appointment of another; but, upon appeal, the Lords Justices reversed that part of the decree, without prejudice to any question, whether the trustee should or should not at some future time be discharged from his office,—their Lordships considering it to be the duty of the Court to ascertain to whom such dissensions were attributable.

A settlement contained a covenant by the intended husband and wife, that the wife's after-acquired property should be conveyed and transferred to the trustees when the same was of the value of L.500. The lady's grandmother, after the settlement, made her will (reciting the fact of the settlement), by which she gave the wife certain specified chattels and effects, and gave her residuary real and personal estate to trustees upon trust to sell, and to hand over the proceeds to the trustees of the settlement upon the trusts of the same. It was held, the value of the lady's interest in the residue was not to be included in the estimate of value, because it was not so given as to be capable of settlement, according to the construction of the covenant; and as to the chattels, the question of value must depend on the result of inquiry.—(*Forster v. Davies*, 31 L. J., Ch. 276.)

MARRIAGE SETTLEMENT.—A. became a party to a settlement, executed on the marriage of his nephew, and granted to the intended wife an annuity, to commence after his death, charged on lands of which he declared himself entitled at law or in equity to an estate in fee-simple. He gave her a power of distraining on these lands for the annuity (subject, however, to any charge on them which he had created or might create for his own wife); and he also created a term of years in the same lands, which he assigned to trustees to hold for the purpose of satisfying the annuity by entry and distress, subject as aforesaid. On A.'s death proceedings were instituted by other parties in Chancery, and a decree was pronounced, declaring that he was only entitled to a life estate in the lands which he had charged. The annuity fell into arrear; and it was held by the House of Lords, affirming a decree of Lord Chancellor Chelmsford, and reversing a previous decree of Vice-Chancellor Wood (*dissentiente* Lord St Leonards), that the settlement gave the annuitant a right to proceed against the personal estate of the grantor for satisfaction of the annuity. No costs of the appeal were given.—(*Monypenny v. Monypenny*, 31 L. J., Ch. 269.)

NEW TRIAL.—Plaintiff, in an action for loss of and damage to his goods, caused by the alleged negligence of defendant, had a verdict with one farthing damages. The judge reported, that, as to goods to the value of L.2, the evidence in plaintiff's favour was all one way; but that he could not say a verdict either way would have been wrong. Plaintiff obtained a rule for a new trial, on the ground that the verdict as to the damages was against evidence, and the verdict itself irrational and absurd. It was held, discharging the rule, with costs, that the verdict was not necessarily irrational; and that, considering the smallness of the damages, the Court ought not to interfere. Pollock, C. B.: We are asked to set aside this verdict, because it is 'inconsistent;' that is to say, that if the plaintiff is entitled to a verdict at all, he must be entitled to a verdict for more than one farthing damages. A case has been referred to, in which Lord Campbell is said to have pronounced a verdict to be so 'inconsistent' that he refused to receive it. I can conceive some cases in which a judge may be justified in doing so; but almost the only class of cases which now occurs to me in which a verdict for the plaintiff, with nominal damages, must necessarily be inconsistent, is that of actions against insurance offices on life policies, where the only question can be whether the life assured was put an end to by any of the prohibited causes; there, no question can be made as to the amount of damages if the verdict be for the plaintiff. The amount must be the sum mentioned in the policy. There, a verdict for the plaintiff, with nominal damages, would be clearly absurd. But we cannot deal with a verdict in a case like the present as 'illogical' or 'inconsistent.'—(*Mostyn v. Coles*, 31 L. J., Ex. 151.)

DRAMATIC COPYRIGHT.—Plaintiff, the author of a drama, published a novel founded thereon, containing in substance the same incidents, characters, and language. Defendant's son dramatized the novel; and, in so doing, took many of the characters and incidents, and much of the language of the novel, and, consequently, much which was the same as in plaintiff's drama, but without having seen or in any way known of plaintiff's drama; and defendant then represented what his son had so dramatized at his theatre. Such representation held an infringement of plaintiff's stage copyright in his drama, as defendant's son was not the author in respect of such parts of his drama copied from the novel which were the same as the corresponding parts of plaintiff's drama. *Quære*—Whether a publication by defendant's son of his drama would have been an infringement of plaintiff's book copyright in his novel or drama. Erle, C. J.: The fallacy lies in the allegation that the defendant's son is the author of his drama, '*It is Never Too Late to Mend*,' which is true in one sense and untrue in another. He is the author of parts of it; and, in respect of publishing or representing them, he infringes no right of others, and might sue any other that infringed his right. But in respect of the parts copied from the plaintiff, if he was sued for publishing and infringing the book copyright, he might perhaps be excused under some of the rules relating to literary property, and to the power of abridging or taking extracts therefrom, or the like; but he could not justify on the ground that he was the author; and if, as here, he is sued for representing those parts, and so infringing the stage copyright, he cannot justify as the author, and that alone is the ground which is now to be disposed of.—(*Reade v. Conquest*, 31 L. J., C. P. 153.)

PRINCIPAL AND AGENT.—A. F., a broker in London, having some rum for sale, made a contract with L., and gave him a sale-note in these terms:—'Mr L., London, Jan. 15, 1861.—I have this day bought in my own name, for your account of A. K. T., 259 puncheons of Cuba rum, sold at 1s. 9d. per gallon. Landing charges 5s. per puncheon, to be paid by the buyer; landing gauge; prompt 23d March; brokerage, $\frac{1}{2}$ per cent.; money on delivery, or L.5 per cent.; I am your obedient servant, A. F., broker.' A portion of the price of the rum was afterwards paid to A. K. T., and received by him. It was held, that A. F. could not maintain an action for goods sold and delivered against L. for the residue of the price of the rum, but that the action should be brought by A. K. T.,

the principal. And, further, that evidence was not admissible to show that A. F. and L., at the time of the bargain, had agreed by word of mouth that a deduction of two months' warehouse rent should be made from the price of the rum, and that the custom of the trade as to allowing only one month's warehouse rent should not attach. Blackburn, J. : Had there been no written record of the contract in this case, I incline to think, though it is not necessary to decide it, that the form of the invoice would have been evidence for the jury, on which they would have been justified in finding that the contract really was made with Fawkes, the plaintiff, in his own name, and as contracting party, though he was known to be an agent; and if that had been so, I see nothing in the subsequent interference of the principals that would have prevented the plaintiff from suing in his own name. But the sale-note must, upon the evidence, be taken to have been rendered for the express purpose of being the record of the contract; and therefore the question, what the contract really was, must depend entirely upon its construction, which is not a question for the jury.—(*Fawkes v. Lamb*, 81 L. J., Q. B. 98.)

BOTTOMRY BOND.—Where it appeared that at a foreign port, at which the master had taken in necessary supplies, the owner of the vessel had a recognised agent within the possible and probable knowledge of the person making the advance, the Court held that the bottomry bond given for such advance was void. In all disputed cases of bottomry bonds the Court expects that, where it is practicable, the master will by his affidavit show affirmatively the good faith of his own transaction and the circumstances relating to it. Dr Lushington: The general rule is this,—that, in order to enable a mercantile house to advance money or furnish requisite supplies, there should exist an inability on the part of the master either to obtain those supplies on his own personal credit or on that of the owner of the ship. Now that, as a general principle, is undoubtedly true; but it may admit of this qualification, that if the merchant who furnishes those supplies, and at the same time takes a bottomry bond, is in a state of invincible ignorance as to the existence of an agent in the same town, the bond will be good; but we must recollect that invincible ignorance means that ignorance which it is not in the power of the merchant to overcome by taking requisite means to obtain information on that subject.—(*The Faithful*, 31 L. J., Pr. and Adm. 81.)

COLLISION.—The owners of cargo on board a vessel proceeded against are liable only for the net freight, for which they would be liable to the shipowner. Costs of payment of freight into Court by owners of cargo may be deducted from the amount paid. So also may expenses incurred by non-fulfilment and payments stipulated by charter-party to be paid to the owners of freight as commission.—(*The Leo*, 31 L. J., Pr. M. and Adm. 78.)

CONTRACT.—A legal contract may be made with a fluctuating body, such as a volunteer rifle corps, to supply certain of its members with uniforms, under which each individual member of the corps will be liable for the price of all the uniforms. And where plaintiff, a tailor, supplied uniforms to certain members of the C. Rifle Corps, and brought an action against one of the members for the price, entries in the plaintiff's book (made evidence by the defendant) headed 'Dr., C. Rifle Corps,' is some evidence from which a jury may be justified in finding that the contract was made with the C. Rifle Corps.—(*Cross v. Williams*, 31 L. J., Ex. 145.)

PROTECTION ORDER.—Where a married woman obtained a protection order under 20 & 21 Vict., c. 85, and died intestate, leaving children who were minors, and her husband her surviving, the Court, in the lifetime of the father, who was abroad, granted administration, for the use and benefit of the children, to their uncle, who had been duly elected by them as their guardian for that purpose.—(*In the goods of Weir (wife of Peter Weir), deceased*, 31 L. J., Pr. 88.)

THE

JOURNAL OF JURISPRUDENCE.

BUSINESS IN THE COURT OF SESSION.

FROM time to time we have adverted to the subject of improving the forms of process and mode of procedure in the Court of Session ; and although the meagre remedy applied by the Legislature five years ago has in some measure cleared arrears, the fact remains that the ordinary business is retarded by obstacles to an extent that is unprecedented in any other court in the kingdom. It seems almost vain to hope for any adequate measure from the Legislature,—after all that has been said on the subject, and especially after the mockery perpetrated by it, in the shape of a remedy, in 1857. Still, let us inquire what is the easiest remedy for the evils that are complained of, and how far, and in what way, the present system is capable of improvement at the hands of those who are engaged in its administration. The cases before the Court of Session had, until lately, been increasing for many years ; the general litigation of the country is still increasing ; and yet we had the startling announcement in the Rolls, one day lately, of there being ‘No Bills’ in either Division. Let us look at the matter fairly. There is a vastly increased commerce and population, giving rise to an increase of transactions and questions, mercantile and social, and yet the business of the Supreme Court is diminishing. This is the fact ; how is it to be accounted for ? It cannot be that the public no longer wish a Court of Review, or that there is less confidence in the wisdom and integrity of the judges who occupy the Bench of the present day than was reposed in their predecessors. Nothing of the kind. The public, or those of it who may be blessed at any

time with a litigation, regret that the Supreme Court of Review, by its cumbrous mode of process, its harassing delays, is virtually placed beyond their reach. They are disappointed that they cannot obtain within a reasonable time, and without unnecessary expense, the judgment of the distinguished lawyers who now adorn its bench. The dissatisfaction that prevails relates to imperfections of administration ; and it is idle to talk of any other reason for the present state of the Rolls of Court.

It was only the other day that Lord Kinloch called over the whole of his debate roll, and could not get one of his cases proceeded with ; and it is no unusual thing for the Lord Ordinary to wait a quarter or half an hour between debates. His Lordship very properly took occasion, in rather strong terms, to condemn such a state of matters. The counsel in the cases, on one side or other, were, we presume, engaged elsewhere. Here is one source of delay which has the effect of continuing the same causes on the Roll from week to week, and sometimes over a whole vacation. We shall deal with it by and by.

But the great cause of delay arises in preparing the record, and in bringing the case to an issue. In this we even find the statute set at defiance. There is a kind of etiquette which has crept into practice among the agents, that, whenever asked for a prorogation or other indulgence, they must grant it, under a tacit menace of being exposed for 'sharp practice,' and of the same being meted out in return. This is carried so far, that, without any good cause shown, they are obliged to comply, although it is obviously to the prejudice of their clients' interests. It would be wrong to condemn the motives for such conciliatory and obliging treatment among that branch of the profession, but they ought to be relieved of the difficulty, if not by counsel (who 'knows no one in the cause but his own client'), certainly by the Court. If it is a defender, he gets a prorogation or two for lodging his defences. The pursuer, as a matter of right, demands prorogations for his revised paper, and the defender again for his revised defences. The case is put out (first enrolment) to close the record, and, as a matter of course, it is adjourned for eight days or longer, without inquiry whether that be necessary or not. When it appears on the second enrolment, one of the parties wishes another adjournment, which the Lord Ordinary says he has no power to grant ; but he will either *fix* a day to close, or drop it altogether from the roll. If the latter course is followed,

the probability is that it is not enrolled again for a week or two. Next comes the adjustment of issues. Suppose they are lodged, and the parties are appointed to be heard on the first enrolment ;—on this occasion there is scarcely ever anything done beyond holding it as the first meeting. And that means nothing, because the same thing takes place as at closing the record ; and after all this waste of time, the matter ends by the Lord Ordinary simply reporting the issues to the Inner House. There, again, more time may be gained before the issue is adjusted, however simple the questions may be, or however settled the form.

Thus may a good part of a session be frittered away,—and we are supposing a case where both parties may be anxious to proceed. In the two instances noticed, the first attendance before the Ordinary goes for nothing, and so the intentions of the Legislature are entirely set aside,—the two diets provided being intended to be peremptory.

How is all this to be explained ? In the same way as the obstructions in the debate roll ; simply from the fact that almost the whole of the business in the Outer House is in the hands of a very limited number of counsel. The same men are employed to act either as junior or senior, as the agent may have a fancy. It is impossible that these gentlemen can attend to and do justice to every case. Nor can they be expected to devote so much time and attention in chambers to the preparation of records as those who are really *junior* members of the bar, and whose little practice, it may be, is confined to that department. It is, moreover, beyond their power to attend at three or four bars at the same time, as leading counsel are required to do every day, not to speak of the preference of the Inner House. Yet agents persist in heaping upon half-a-dozen, or at most a dozen, of the best men at the bar, the whole business of the Court, whether that business be junior or senior practice. Each little delay that occurs is not much ; but when additional time is required for every step that is taken on either side, no wonder that it should give rise to dissatisfaction in the mind of the client at last, who will rather close with his opponent at a sacrifice than submit to indefinite litigation.

So long as this system continues, parties are forced to make miserable terms of compromise. One in point occurs to the writer now. It was an advocacy from the Sheriff Court, and the respondent had the judgments of both Sheriffs in his favour for L.300. A good deal of most unnecessary delay took place in preliminaries,

and then there was the certainty of the long vacation intervening, besides the likelihood of an appeal to the Inner House. An offer of L.200 in these circumstances was readily accepted by the respondent, and no one could say the party did wrong, even although he had been absolutely certain of gaining his cause. There are so many contingencies,—his antagonist might become bankrupt or abscond; and unless it were for the silly ambition of being able to say he had gained a victory, there was wisdom in the course he followed.

There is an expediency in a distinct line of demarcation being fixed between senior and junior practice, or rather between senior and junior counsel, and none can do that better than the agents themselves. It is for the interests of the public that it should be done, as well as imperative for the benefit of the profession. If, indeed, the business of the Court were entirely in the hands of a dozen agents, the anomaly we have pointed out might be understood; but it is not so, and we must try and find a solution somewhere else. May we venture a guess? The country correspondent has very generally a voice in the selection of counsel now, and it is feared that he names at random those who appear most frequently in the newspaper reports of cases. The peculiar qualification of certain counsel for one class of cases more than another, is quite disregarded by the correspondent; the importance to his client of having his pleadings accurately and carefully prepared is blinked; and a selection is made which is unexceptionable but for one thing, and that is, that the favourite counsel is fully engaged already. How gratifying, however, it is to the client, to know that he has got so-and-so's services; and he imagines his case more than half gained by the circumstance! The same idea prevails with the party opposed; and the result is, a protracted litigation, accompanied with all its anxieties and annoyances; the parties wondering all the while what is the cause of delay from time to time, and at last throwing up the whole affair in disgust.

While we speak of the matter here as a public question, its importance to the profession must not be lost sight of. If the agents just consider what must inevitably ensue on this course being continued—that it will prove ruinous to themselves—we have little doubt they will immediately begin to apply the remedy. Neither are the interests of the junior bar to be overlooked. It is surely right that they should know and feel that a sphere of duty is left open to them in the profession, which is naturally the preparation of

written pleadings. Nay, have they not just cause for complaint if no change takes place? Probably it was under a similar state of things that Francis Horner, then a young *Briefless*, pacing the Parliament House, with feelings which he himself best describes, penned the following passage in his diary (1801): 'Though I become daily more attached to the law as a study, I become daily more averse to the practice of the Scots Court. There *are certain circumstances* positively disagreeable, both in the manner in which business is conducted, and in the manner in which success is attained; and these disadvantages are rendered the less tolerable after comparison with the Courts of the South.'

The present Lord Advocate some years ago attempted to mark a distinction between the senior and junior bar, by introducing into the Faculty patents of precedence, to be conferred by the Crown in the same way as the letters of pre-audience which prevail at the Irish bar. These honorary distinctions have been found to work well both in England and Ireland; and, were the system introduced here, there does not appear any good reason why it should not be equally successful. The profession could then come to some distinct understanding, not only of the nature of the duties and kind of business to be undertaken by senior or leading counsel, but also who were the members of the bar who held themselves out for that practice. The Faculty, at the time referred to, rejected the suggestion, as likely to lead to anomalies and invidious distinctions. In justice to the gentlemen who are rising into senior practice, let us add, that the greater number of them supported the project, and that the opposition came chiefly from retired members of the profession, who had nothing to gain or lose by the change, but in whose minds a passion for republican equality seems to have operated as a paramount consideration. While we have no desire to enter on a discussion of the merits of the system, we are persuaded that it might have done much to have remedied the evil complained of.

Other proposals will probably meet with as little favour from the bar. There is one, the justice of which ought to recommend it,—to institute a rule that the members shall confine their practice to particular Outer House bars. This would be beneficial to the litigant, at least to this extent, that he would be certain to secure the services of his counsel when his case was called. And this is just as it should be. Why should certain members of the bar be required to undertake several causes which are sure to go on before different

Lords Ordinary at the same time? Why should other parties who have equal claims on the time of the Court have their cases hung up and protracted by the non-attendance of counsel? Is it proper that the other judges, and the agents in other suits, should be obliged to wait the convenience of particular counsel? If these questions are answered in the negative, as they must be, the remedy must either lie with the Legislature or the Bench. In England, counsel have to confine themselves to particular courts. We do not allude to the well-known rule that counsel cannot practise both in the courts of law and equity, but to the practice which originated with counsel themselves, and is maintained solely by their consent, and by which the leading members of the profession, whether silks or stuffs, confine themselves to one court in their own department. At the Common Law bar, the same men who practise as leaders in any *one of the three divisions*—Common Pleas, Exchequer, or Queen's Bench—do not practise in the other two; and in Lincoln's Inn the rule is, that leading counsel must confine themselves to *one court of first instance*, that is, to either of the Vice-Chancellors or to the Rolls Court, in addition to the various appellate courts. The effect of this regulation is the same as if leading counsel here were confined to one Outer House bar in addition to the practice of the Divisions.

But as any such regulation would require the intervention of the bar, which is not likely to be favourable, the responsibility must be transferred to the bench. It naturally rests there. The judges have no interests to consult, no favour to show. It is for them to regulate the business, and surely there is nothing to prevent them adopting some strict rule, whereby all unnecessary delays may be avoided. For example, if each of the Lords Ordinary, instead of putting out, say twelve debates for the week, put out two or three for each day, on the understanding that they must be proceeded with on each particular day. Failing the attendance of counsel on one side, unless necessarily absent in the Inner House, judgment ought to be given, or the case should be advised *ex parte*; and if both counsel were absent, then let the case be dropped from the roll. This is the rule in the Vice-Chancellors' Courts as well as in the Courts of Appeal in Chancery; it is virtually the rule in the Inner House, and why should a difference be made in the procedure in the Outer? This plan has much to commend it. It is simple, and requires no legislative enactment. Its adoption by the judges would force the lead-

ing counsel to come to some arrangement for the better division of practice, and thus secure to the client his right of having his case heard continuously and in its proper order.

Another plan having many advantages, with the same end in view, was recommended in 1857 by the Society of Solicitors before the Supreme Court, whose suggestion in a matter like this deserves the greatest respect. It was to this effect, that motions should be made only on two days a-week, and the other days occupied with debates. Both plans would lead very much to the same result; both would facilitate the disposal of cases. The two days a-week would be quite sufficient for the purpose of disposing of motions in the preparation of the record, and it is in that the evil of delay chiefly exists. Then, on the other hand, this recommendation of the Solicitors had this further trait in its favour, that the Lords Ordinary would have two clear days each week for the hearing of debates. These would proceed without the same probability of interruption, which at present is sure to occur—interruption which must be as annoying to the judge as it is to the counsel. The argument has often to be recapitulated at the next calling, and the previous hearing almost goes for nothing. Now, since there is no written argument, it is essential, in order that justice may be done to a cause, that there should be a full and patient hearing; and it is plain that that is only to be accomplished by certain free days being set apart for debate. And if that were done, it should be a rule that counsel engaged in any debate could not leave the bar till he had concluded, unless he was called to the Inner House.

These changes are not of a radical nature, and could be carried out without legislative enactment. But there is still a strong feeling in favour of a more sweeping alteration. When the proposal for a Third Division was agitated a few years ago, it met with a very considerable share of support, not only in the profession, but from the public generally. It would certainly be better that it should be adopted, than that business in the Outer House should be conducted as heretofore. Looking at the matter practically, the objections that were stated to the formation of a new Division do not seem to be insuperable, while, on the other hand, the necessity for a change is stronger than ever. As regards expense, it is to be observed, that as the pleadings, and in many cases the productions also, are now printed as soon as the record is closed, a debate could be brought at once before one of the Divisions at the same expense as before an Or-

dinary. There is now a very general feeling in favour of an appeal direct to the Inner House, in cases where there has been a proof in the Sheriff Court. This is done now, we should say, in more than two-thirds of advocacy cases. And it is very right, because what suitor will say that he will be content with the judgment of the Lord Ordinary, and acquiesce in it? But, in truth, in most instances, it is a great waste of time and money to carry through a case before the Ordinary, if it is not the intention of the parties to acquiesce in his judgment. In this, we are far from undervaluing the opinion of the Ordinary; and where the case involves only a pure question of law, the preliminary debate in the Outer House, when all the various points and phases can be brought out in argument, followed by an interlocutor and note, presenting the case in a clear light, is of the greatest value in preparing the case for the Inner House, besides affording an opportunity for the correction of errors without going to the House of Lords. But in advocations, consistorial causes, or questions mainly depending on facts, where judgment must be given on a long proof taken before a commissioner, where, in fact, the Court sits more as a jury than as judges, what is the substantial benefit to be gained by the decision of the Ordinary? We need not go far for an illustration of this. Almost daily, during the last three weeks, has the able and elaborate debate in *Longworth or Yelverton v. Yelverton* been going on before Lord Ardmillan on a voluminous proof. To lessen the ruinous waste of the public time, Lord Ardmillan has cheerfully given up to this and other consistorial cases a large share of the time to which he is entitled for the preparation of his judgments and necessary rest; an example which we hope to see imitated in other quarters when the duties of the judge demand the sacrifice. In due time we shall have a learned judgment from the judge who has heard the evidence, and is therefore best qualified to decide on its import. But the facts and circumstances must be as fully detailed and discussed again in the Inner House, as if no judgment had been given in the Outer. Would it not be expedient to bring such cases at once before a Division, or else to make the Ordinary's judgment final, subject to exceptions on reserved points? Of course, if it were competent to either party to choose judgment in the Inner House directly, a Third Division would become absolutely necessary, as two divisions would be quite inadequate to overtake the business.

Whether a Third Division is formed or not, the Inner House is capable of improvement in the conduct of business, in one respect at least; and the sooner that is effected the better. We refer to the absurdity of eight judges sitting sometimes for one hour, at other times for two hours, to hear and dispose of the most simple *pro forma* business. The single bills, on an average, occupy one hour each day, which makes a loss of one sederunt-day each week in both Divisions. Why should this continue? Is it not ludicrous to see four judges sitting for about two hours to determine, as occurred recently, whether a person should get a remit to the reporters on *probabilis causa*?—and that is as knotty a point as arises in these *pro forma* matters,—or, perhaps, still more to see four judges sitting while the President determines whether the cases in the single bills are to be sent to the Summar Roll or the Short Roll? The proposal that the junior judge of each Division should sit an hour earlier, and dispose of all that kind of work, was made long ago; and if he did, the debates in the Short Roll would be greatly accelerated. The transference of the summary petitions from the Inner House to the Junior Lord Ordinary has not been attended with any evil consequences. On the contrary, although that was a much more important alteration than the one proposed, it has been carried out with the utmost success. The ministerial business arising out of the *nobile officium* of the Court, including the business under the statutes relative to entails, and the appointment, exoneration, and discharge of factors, is as efficiently managed by the Junior Lord Ordinary as it used to be in the Inner House. And how much time is saved in consequence of the change! We have no doubt that the same result would follow the change now proposed; so that the judges would be enabled to proceed with debates continuously, and counsel would be compelled to come thoroughly prepared, instead of stumbling through a case by reading from the printed papers, and commenting on the passages, in the loose and inconsecutive style which is now in vogue.

We cannot close without entering our protest once more against the unnecessary length of the approaching vacation. But if it is to be continued at its present length, we again suggest that the box-days be increased; and that on these days one judge should hold a Court, for the purpose of hearing incidental motions and making up records. As it is, the vacation is a total waste of time, and the litigant whose object is delay can obtain it without inconvenience or.

expense. The box-days are of no use without a judge holding a Court. Few of the papers due on these days are lodged ; and there being no Court, there is no compulsitor. We may revert to this subject hereafter, but throw out these suggestions in the hope that the profession will insist on greater facilities being given for the despatch of business.

We shall not pursue this subject further at present. In the course of the remarks that have been made, it is plain that something requires to be done to improve the conduct of business ; and suggestions have been thrown out as to the easiest remedies that can be applied, —such as are within the reach of the agents, the counsel, and the bench. The subject cannot be too often brought before the profession and the public, so long as the system is fraught with such evils as exist. We shall take an early opportunity of directing the attention of the profession to the defects of our system of written pleading, which are intimately connected with the evil of delay already adverted to.

PROPOSED PUBLICATION OF OUTER HOUSE REPORTS.

AMONG the contributions to professional literature which may be expected in the ensuing winter season, there is one to which we are anxious to give all the prominence which its importance may justly demand. We refer to a proposal, which we understand has been favourably entertained by a leading publishing firm, to undertake a series of Reports of Outer House Decisions. This has long been a *desideratum* with the profession ; and we trust, if the work is carried out as it ought to be, that it will receive their support, which is essential to success.

No greater obstacle to the development of a consistent and well-proportioned system of jurisprudence can exist than that of defective reporting ; and however excellent the existing reports may be, they must, if they are *incomplete*, inevitably fail to accomplish the object in view, which is, to preserve for future reference a record of all the law that is actually laid down and declared by the Superior Courts. The existing series of reports give only the decisions of the Inner House, which, though in some respects the most valuable, form only a *part* of the judicial determinations of the Court of Session, *all* of which are entitled to authority as decisions of a

Superior Court. Although it is not easy to arrive at a close approximation in the absence of statistics on the subject, yet, from the inquiries we have made, we believe that the reportable cases decided in the Outer House, and which are not appealed to the Inner, amount to about one-half of the number of those that are appealed.

It is a common remark, that all decisions worth reclaiming against are appealed; but this statement is not correct, if the importance of the questions are measured by a legal standard, and not simply by the value of the sum in dispute. Every practitioner will be able to recal from his own recent experience many instances of decisions upon interesting questions of law, which were not appealed, either because the stake was too small, or because a compromise was effected subsequent to the Lord Ordinary's decision. Again, there is a numerous class of cases upon the construction of wills and settlements, where the competition lies between relatives who do not wish to carry litigation further than is necessary for the protection of their trustees, and where, accordingly, the Lord Ordinary's interlocutor is not infrequently acquiesced in. It is in this class of questions that the want of a sufficient body of case-law upon practical points has been most severely felt. Scarcely a week passes without counsel being consulted on questions of construction which they know have been the subject of adjudication in repeated instances; yet they cannot venture on giving a decided opinion, because there are no reports of Outer House cases.

In addition to the two main classes of cases, those on contract and the interpretation of deeds, there are several distinct departments of jurisprudence, the administration of which is almost wholly confined to the Outer House, being specially appropriated to one or more of the judges in that Division of the Court.

There is the Teind Jurisdiction, the Exchequer, the Bill Chamber, the Consistorial Jurisdiction, the Lands Valuation Appeal Court, the New Appeal Court in Registration Cases, and last, but not least, the Jurisdiction of the Junior Lord Ordinary in Petitions. In consequence of there being no reports of Outer House cases, very little is known about the practice in these special departments, even amongst members of the profession in other respects well informed; and in almost every case inquiry has to be made at the clerks upon points which ought long since to have become part of the common stock of professional information.

We know it will be said by many, that Outer House reports

would be of little value, because the decision of a single judge is not authoritative. If by this is meant, that it is not binding on the judges of the Inner House, the statement is correct; but the inference from it—that the reports would be valueless—is wrong. How frequently do parties act upon an opinion of counsel which may be adverse to their own views and wishes? and yet such an opinion cannot pretend to the same degree of authority which is due to the opinion even of a single judge of the Superior Courts. Besides, the objection applies to the decisions of the Inner House also. A decision of one Division is not binding upon the other. The decision of both may be reversed by the whole Court, and that again by the House of Lords. But the decision of any of those Courts, although liable to be questioned *de recenti*, does, if it is received as authoritative by the profession, and just *because* it is so received, become a binding decision in course of time. It has frequently been remarked by the judges of the House of Lords, that a single decision of the Court of Session, which had received the stamp of professional approval, was sufficient to fix the law; and that the Court of Appeal would not go back upon the merits of the question. A well-known example of this rule suggests itself, in the decision pronounced in 1812 in *Campbell v. Edderline's Creditors*, which established the doctrine of radical right, in trusts *inter vivos*. No other case on the point occurred, until that of *M'Millan v. Campbell*, in 1832, when Lord Gifford said, that if the question had been open, he would have hesitated to affirm the doctrine; but he would not disturb a decision which had been so long acquiesced in, as this would tend to unsettle the law of property. In England, where the decisions in the Vice-Chancellor's and Rolls Courts have always been reported, such decisions, if just in themselves, and more especially if they have been allowed to stand for any considerable time, are treated by the Court of Appeal as authoritative decisions to be followed, unless good reasons can be adduced for reconsidering the point upon principle. In our practice, the Lord Ordinary's note in a case is sometimes found to be a better guide to the principle of a decision than the reported speeches of the judges of the Division. And we are satisfied, that if the practice were once introduced of reporting Outer House cases, in no quarter would there be a greater willingness to take advantage of the aid to be derived from the decision of the judges of the Outer House, than amongst their brethren of the Inner.

But whether binding on the Appellate Court or not, those decisions, if reported, would necessarily be received as authoritative by the profession, until an opposite judgment were obtained from one of the Divisions. It is a very narrow view of the purposes subserved by law reports, which would judge of them by their utility for forensic purposes. For once that a case is cited in Court in support of a proposition which it tends to establish, it is referred to a hundred times out of Court, and accepted and acted upon as an authority for the point actually decided. Outer House cases, like others, would be of great use to the practitioner as guides to his judgment, in circumstances where a resort to judicial determination was not contemplated. They would be especially useful as data for the ascertainment of rules of practice and rules of interpretation, which, though important in themselves, do not involve pecuniary interests of such magnitude as to necessitate an appeal to the Inner House, and upon which, therefore, very little authority is to be found in the books.

It may be said that the result of what we contemplate will be to load the books with a mass of decisions upon questions of inferior importance. We admit this, and see no reason to regret it. If such points were worth raising once, they are worth preserving, in order that they may not be raised again, or raised only under the disadvantage of the proved fact, that they have been already raised and determined. As the question is a purely professional one, with which the public are noways concerned, it is worth observing that the profession are certain to benefit by the better settlement of the law. Experience has proved this in innumerable cases. It is well known to practising men, that the decision of one question generates others, just as the discovery of a principle in science gives birth to a host of new problems, the existence of which was previously unsuspected. In the present depressed condition of practice in the Superior Courts, this is a consideration not wholly to be disregarded.

In every point of view, therefore, we think the proposed publication commends itself to the encouragement of the profession; and we trust that nothing may occur to prevent the design from being successfully carried into effect. We earnestly invite the attention of the profession to the subject, and will gladly give publicity to any suggestions that may be addressed to us, whether favourable or adverse.

NOTES IN THE INNER HOUSE.

FIRST DIVISION.

Petition, A. B.

THIS was a petition by a bankrupt, who was sequestrated in March 1859, praying for his discharge under the Bankruptcy Act of 1856, the sec. 146 of which provides that, after the lapse of two years, such a petition may be presented without any consents of creditors. The trustee reported favourably, his certificate under sec. 146 being to the effect that the bankrupt has 'made a fair discovery and surrender of his estates, has attended the diets of examination, has not been guilty of any collusion, and that his bankruptcy has arisen from innocent misfortunes and losses in business.' Five out of twenty-one creditors opposed the petition, on the ground that either the bankrupt had not made a full discovery of his effects, or that he had been trading recklessly, keeping no regular books, and been unable to account either for his debts or assets. From the trustee's account of intromissions, it appeared that the total assets recovered amounted to L.3, 16s., while the expenses of collecting them amounted to L.4, 5s., leaving 9s. due to the trustee. From the bankrupt's examination, it appeared that he stated there was a debt of L.1010, 15s. 8d. due to him by his brother; but whilst he was unable to explain how that debt was contracted, no part of it had been recovered, or seemed to be recoverable, by the trustee. The Lord Ordinary granted the discharge, going chiefly on the trustee's favourable certificate. The creditors reclaimed, and the First Division recalled the discharge. The grounds on which their Lordships proceeded were, the extremely unsatisfactory explanations offered by the bankrupt as to the state of his affairs. Much reliance was placed by the bankrupt on the trustee's certificate, and on the lapse of time since the sequestration. The latter of these points was thus disposed of by Lord Deas:—'The discharge is not a thing which follows necessarily by the mere lapse of time, as sometimes seems to be imagined. That is not the law. If it were, anybody might contract as many debts as he pleased without having a penny to pay them, and by simply waiting for two years, get whitewashed from all liability.' The *dictum* is unquestionably supported by the sec. 146 of the Bankruptcy Act of 1856, and the sec. 3 of the Bankruptcy and Real Securities Act of 1857. The former of these enactments,

while giving bankrupts the right, after two years, of applying for discharge without any consents, expressly reserves to the trustee and creditors the right of opposing the discharge on any sufficient ground; and the latter enactment gives the Court the very salutary power of refusing the discharge, even though no opposition is made to it by the trustee or creditors. In the general case, there can be no doubt that the creditors may be safely left to protect at once their own interests and those of society; but there are cases in which it is most expedient that the Court should have the power, in the interests of society alone, to refuse the discharge of a dishonest, or even reckless trader.

There is, however, a limit to the rule laid down by Lord Deas; and that is, we apprehend, that although the mere lapse of the statutory two years will not, *per se*, ground an application for discharge, the lapse of a considerable number of years will do so, always assuming that there is no reason to suppose that the bankrupt has failed to make a fair discovery and surrender. This seems to be the doctrine laid down by our own Court in *Gemmell v. North British Bank*, 20 December 1853, 20 D. 264, where the sequestration had lasted for six years, and the *Lord President M'Neill* said, 'As to the personal objections, they amount to a good deal of reflection on the conduct of this party, who had yielded to the disposition to indulge in speculation, which was prevalent a few years ago. His conduct cannot be defended. But his sequestration having taken place in 1847, the question now is, whether these objections are enough to exclude him from his discharge. I cannot help thinking that he has been long enough kept out of it; and I am not inclined to give effect to these objections.' Lords *Rutherford* and *Ivory* expressed themselves in the same case to the same effect. A like judgment was pronounced by the Lords Justices in *re Matheson*, 27 Jan. 1862, 31 Law Journal, N. S. Bank. 23. The English judges expressly exclude the case where the bankrupt has been guilty of falsehood and fraud; but even in regard to such a case, we apprehend there is nothing in the statutes to lead to the result that the Legislature meant to doom any one to bankruptcy for life. The more culpable the conduct, the longer, of course, should be the period during which the discharge will be refused; but there should be a term in the case of all.

Another important matter dealt with by the First Division in the present case, was the province and duty of the trustee in reporting

on a bankrupt's conduct, under sec. 146. In the first place, they settled that he is merely a reporter, and not a judge; for, though the trustee's report was favourable, the Court examined it, and being satisfied that it was not rested on sufficient grounds, they disregarded it, and refused the discharge. That view of the subject is fully borne out by the statutes both of 1856 and 1857. Then as to the trustee's and creditors' duty, the Court very clearly decided, that they ought to oppose the discharge when the bankrupt's conduct had been discreditable, even although they had no interest of their own to serve thereby. Accordingly, when the creditors in the present case asked their expenses, they were at once awarded.

Lord CURRIEHILL—I am clear that the creditors should get their expenses. I think they have done a great benefit to the mercantile community by bringing the case into Court. It is well known that creditors are often deterred from opposition in such cases by the dread of expenses.

Lord DEAS—I entirely agree with that observation. The duty of opposing a discharge is one which creditors generally are not very willing to undertake; and they deserve all the more credit in this case, that they are only five out of twenty-one.

The same view has been taken in England. Thus, *in re Matheson, ut supra*, even when the Court granted the discharge which they opposed, the official assignee and creditors were found entitled to costs; 'Lord Justice Turner stating, that he thought it of importance that official assignees should not be discouraged in coming to the Court on these applications.'

THE MONEY MARKET REVIEW AND THE 'JUDGMENTS EXECUTION BILL.'

ANOTHER attempt, it seems, is to be made to introduce this abortive measure. At a conference of the collective wisdom of the Trade Protection Societies of the kingdom, held at Gray's Inn Hotel on the 10th June, resolutions were adopted pledging those societies to support a Bill on the principle of that introduced by the member for Ayr some years ago, and which met with such a signal discomfiture that no attempt has since been made to bring it before the House of Commons. The following leader, which we extract from the 'Money Market Review,' is illustrative of the extravagant notions prevalent even amongst respectable and well-informed persons in mercantile circles regarding commercial law and jurisdiction. It is not too much to say, that until a more moderate tone and a

more conciliating spirit is displayed towards the legal profession, by the promoters of such measures as we have referred to, their proposals can receive no countenance from those to whom they are addressed:—

'This is a subject of the utmost importance to Englishmen, Irishmen, and Scotchmen engaged in trade with each other. In order to bring it more prominently before the public, a meeting of delegates, representing the three kingdoms, was held on the 10th inst., at Gray's-inn Coffee-house, when several resolutions were passed with the view of endeavouring to obtain an alteration in the law, so as to enable a creditor to recover a debt in any part of the United Kingdom, by the decree of one Court instead of three. It is a strange anomaly that, notwithstanding the nominal union of the three countries, their respective Law Courts treat each other as foreign tribunals, no greater effect being given by the Courts of either to a judgment pronounced by the other than to a decision in France or America. An action for goods sold and delivered may be commenced in either of the countries, and if, after a trial and judgment, and just as the fruits of the litigation are to be reaped, the debtor escapes to either of the others, the creditor must commence proceedings *de novo*. Take the following case, which has recently occurred in Glasgow:—A creditor holds a Scotch decree of registration (which is the same as a judgment) on a bill of exchange. The debtor has removed to Ireland, where he has purchased some property, and where he now resides. The creditor must commence fresh proceedings in Ireland. If the debtor appears to the action, the creditor must find security for costs, and, in proving his Scotch judgment, he may be subject to the loss of much time, trouble, and expense. So also in respect of an English creditor's judgment debt, should the debtor go to Scotland. It is simply a matter of fact that the judgment of an English Court would have infinitely more moral effect, if set up before a tribunal of France or the United States, than it would have with the Lords of Session in Scotland. This anomaly is a reproach to our age and country, and is the more striking when it is considered that a witness cannot be compelled to come from any one of the countries to the other.

'To remedy this state of things, and to make the judgments of one Court effectual in all three by means of a general registration, was the object of a Bill introduced into the House of Commons by Mr Crauford, the member for Ayr; but it is frustrated principally by the opposition of the Irish members. We form, certainly, one kingdom, and we are supposed to be one nation, and yet our commercial laws seem constructed with the special and particular object of tempting us to swindle, to cheat, and entrap each other, as if we were two hostile and predatory tribes in Tartary or Central America. Every facility is given, on either side, to play the knave, whilst all the obstacles which perverted ingenuity can desire are heaped up in the path of the hapless victim who looks to law for redress of wrongs which *the law itself has inflicted*. With respect to England and Ireland, the evil is comparatively a minor one, the laws being similar. It is when differences arise between English or Irish and Scotch traders, when Scotland becomes a party in law contests, that pernicious obscurity reaches its climax. The late Mr Baines, while speaking on this subject, said,—“The English merchant trading with Scotland finds himself involved in litigation, from ignorance of the law of Scotland; and if he applies to his professional man, it is more than probable that he, the lawyer, also knows nothing about it; and how can it be expected he should know?” Not only are the practices and theory of the Scotch Law Courts, as regards all matters of commercial contracts, as different from those of England as are the laws of China and Japan, but the very phraseology of pleadings north of the Tweed is as unintelligible to an English lawyer as if it were Chinese, and *vice versa*. In Scotland the bankruptcy system (with the same general object as that of England) has a totally different machinery and nomenclature. There is, consequently, much confusion,

by reason of the different meaning of the word "bankrupt." In Scotland bankruptcy is called "sequestration." There are also other differences, such as in the terms "assignee" and "trustee." What is called proving a debt in England is called "ranking" in Scotland, and the certificate of a bankrupt is called "the discharge in sequestration." The law in North Britain and in South Britain is not only distinct, but *antagonism is its essential characteristic*. In the spirit of the border warfare of old, our British Jurisconsults are engaged in thwarting and stultifying each other. It is not for an instant to be supposed that the judges of the two countries are merely gratifying a vain and dishonest spirit of rivalry in the practices which we are now deploring. By no means. It may be that local and professional bias, the partiality engendered by habit and by narrow technical views, exercise some degree of sinister influence, and make bad a little worse than it need be. But, on the whole, the state of our commercial laws leaves the tribunals no alternative, and it is only by a reconstruction, consolidation, and simplification of the English and Scottish laws of every shape, that a system capable of dispensing equal justice to the subjects of England, Ireland, and Scotland, can be permanently established.'

We hardly know whether the reviewer is most to be commended for the forcible-feeble character of his rhetoric, or for the strange confusion which characterizes its argument. He is at pains to assert that the laws of England and Scotland are radically dissimilar: 'The *practice and theory* of the Scotch Law Courts, as regards all matters of commercial contract, are as different from those of England as are *the laws of China and Japan*.' And yet the writer believes in the possibility of assimilation. Is it possible, we beg leave to ask, to assimilate the laws of China and Japan with those of England? Can men grow grapes of thorns, or figs of thistles? Total abrogation, and not assimilation, we should imagine, would be the only feasible remedy if the differences between the two systems of jurisprudence were such as are suggested by the writer of the article. That assimilation is practicable and desirable we grant; that the steps which have already been taken in that direction have been most beneficial, is admitted on all hands. If the panic-mongers of the trade-protection society would have the goodness to point out what further changes are necessary (and these cannot be numerous), they would be rendering more useful service to the advancement of legislation, than by 'howling like Irish wolves against the moon,' when Scotch jurisprudence or practice crosses them in their humour.

There is a consistency in absurdity, in the argument of the reviewer, which must amuse if it fails to convince the professional reader. The remedy he suggests for the absolute and polar state of antagonism which he has discovered between the laws of England and Scotland is, that the judges of the one country should be bound to adopt and give effect to the decrees of the other. It would have been more rational, we think, to have proposed that whenever a decree of the

Court of Session was produced in one of the Courts of Westminster Hall, the judges of that tribunal should be bound *to reverse it*, and to authorize execution at the instance of the unsuccessful party ; and—though we fear the reviewer is hardly impartial enough for *that*,—that English decrees should be dealt with in the same spirit of retributive justice by the sages of the Parliament House. Even trade-protectionists, we should imagine, must admit that it cannot be the duty of a Court of justice systematically to violate the laws of its own territory ; and yet, if the laws of the two countries are, as they say, always and on all points antagonistic, the enforcing of the decrees of the hostile jurisdictions involves, of necessity, the anomaly of requiring a Court to lend the sanction of its process to enforce decrees which, according to its peculiar creed, must be deemed erroneous.

We are indebted to the extravagant utterances of our contemporary on the subject of antagonism for an opportunity of exhibiting, in a strong light, the reasons for withholding our assent to the principle of the 'Judgments Execution Bill.' The assertion is not correct—it is the very contrary of the fact—that the mercantile laws of England and Scotland are as dissimilar as those of Europe and Asia. The differences are now comparatively unimportant, and complete assimilation is quite practicable. It is equally incorrect to assert, as the reviewer does, that the Court of Session treats English decrees with disrespect, or that the two jurisdictions are engaged in thwarting and stultifying each other. In almost every instance the Court of Session gives effect to English judgments upon contract or debt, by what is called 'a decree-conform ;' that is, as a matter of course and without inquiry, even though inquiry be demanded by the defender. But there are occasional instances where this cannot be done without doing violence to the spirit of our national laws, and the supremacy of our national courts of justice within their own sphere. An opinion is generally entertained in Scotland, that the English courts are not so careful as they might be to avoid encroaching on the jurisdiction of their neighbours ; and the profession in Scotland will not consent to legislation, the covert object of which is to bind their courts to lend their sanction to judicial proceedings in England, however arbitrary, encroaching, or unconstitutional.

New Books.

A Hand-Book of the Law of Scotland. By JAMES LORDMER, Advocate, etc. etc. Second Edition. Edinburgh: T. and T. Clark.

ON the appearance of the First Edition of Mr Lorimer's Hand-Book (October 1859), we expressed the opinion that it would be found extremely useful for the purpose which the author had more immediately in view, of diffusing information among the non-professional community on a subject on which it is the duty of every citizen to be informed. We are glad to find that our expectations have been realized, and that the public, for whose benefit the work was undertaken, have availed themselves of the opportunity of acquiring a stock of information on the laws of their country, which, if not very deep, is at least useful and correct as far as it goes.

There are two ways of conveying popular instruction in any science (and law is no exception to the rule): the one is by popular expositions, in which principles—leading or general principles—are alone treated and illustrated by examples, minor propositions being discarded; the other is by summarizing as much of what is known and settled in the law as can be comprised within the limits of a popular treatise, and stating the bare results without explanation or illustration. The former method is the one which we should prefer to follow where the object was to ground the student in principles; the latter, which is the method adopted by Mr Lorimer, is useful in another way, namely, as furnishing a popular work of reference which may be consulted on occasions when professional assistance would not be sought, and when the alternative lies between acting upon imperfect information, or upon no information at all. An executor cannot always have a lawyer at his elbow; a merchant might spend all his profits upon legal advice if he were to seek for it on every occasion when it would be useful; a husband and father may be much in need of advice on the subject of his duties and rights as the head of a family, when he feels precluded by motives of delicacy, or restrained by the seal of confidence, from taking the advice of a professional friend. We think, therefore, that a popular treatise on law, like other works of popular literature, has its legiti-

mate sphere of usefulness ; and as the compilation of such treatises can afford little pleasure to the professional author beyond that which is derived from the conviction that he is doing useful service to the public, he is so much the more entitled to their gratitude and respect.

As we remarked on a former occasion, Mr Lorimer's division of the subject of laws into those of the family relations and the relations between independent persons, is neither logically accurate nor well founded in principle. We hope, however, that in his prelections on public law he will discover a more comprehensive view of the nature of laws in their general relations, of which sound principles of classification form no inconsiderable part. This, however, is a matter of no consequence in a popular work of reference. Again, we cannot help observing at the first glance, that the space allotted by our author to the different departments of the law of which he treats, is utterly disproportionate to the relative importance of those branches in a system of jurisprudence. This apparent anomaly, however, admits of a satisfactory explanation. Mr Lorimer is not writing for lawyers ; and therefore he may omit with propriety much that is only interesting to lawyers. For example, anything like a systematic investigation of the law of property would be thrown away on the general reader. A merchant may consult the Hand-book for information as to the negotiation of bills, or the mode of completing a contract of sale so as to make good his security ; but he would never dream of undertaking personally the examination of a progress of titles, or forming an opinion for himself on the construction of a deed of settlement. Upon such matters, the only advice which could be given to him is to consult his solicitor. Accordingly, on the subjects of the feudal law, the law of succession, and other kindred matters, Mr Lorimer has judiciously limited himself to a brief exposition of principles, accompanied by a summary of the results of recent legislation. This is probably as much as the popular reader is capable of assimilating—as much perhaps as he is likely to wish to acquire.

On the other hand, the law of the family relations and mercantile law are treated by Mr Lorimer in a very complete and satisfactory manner ; and on questions connected with these subjects his work will be much consulted, and will, we doubt not, prove very useful.

On some topics, with which Mr Lorimer is understood to be conversant, he has aimed at a greater degree of completeness than

would have been consistent with the general plan of the work. As an example of this, we may cite the chapter, at p. 441, on the jurisdiction of the Lyon King at Arms, where, among other knotty points connected with genealogy and precedence, he discusses a question which Mr Roebuck has lately taken under his special protection,—the right of the subject to *change his name* without license or leave of the Court. On this topic we should have expected greater accuracy from a gentleman holding the official position which Mr Lorimer occupies. Mr Lorimer throws doubt on the competency of the proceedings in Mr Inglis' case (29 Nov. 1837), where the petitioner, a Writer to the Signet, received authority from the Court to change his name; the ground of the doubt being the refusal to comply with a similar application in the earlier case of Kettle (14 Jan. 1835). But he omits to notice a more recent case than either,—we are not sure that it has been reported,—where authority was given to a member of the bar, now occupying a distinguished public position, to assume an additional surname. In the case we refer to, the decree was made an act of Court, and entered in the books of sederunt; and the ground on which the authority of the Court was interposed was, that the applicant was a member of the College of Justice, and the expediency of giving official sanction to the change in the case of a person so situated.

An interesting feature of Mr Lorimer's treatise is the concluding part, on 'The Machinery of the Law,' into which he has introduced some historical notices respecting the different judicatories of the country, civil, criminal, and ecclesiastical. As an example of the pleasing manner in which the author can handle such subjects, we select the following passages on the history of the office of Sheriff (p. 428):—

'From these enactments it appears, (1.) that the King's Sheriff, as distinguished from the Sheriffs or Bailies of the Lords of Regality, was an officer appointed by the Crown, and (2.) that though in some respects subject to the authority of the King's Lieutenant or Warden (1581, c. 81), he was not his deputy. The Lord-Lieutenant, like the old Commissioners of Array in England, was perhaps only a temporary officer constituted in times of danger, or placed over districts which were actually disturbed; and it seems certain that his functions, like those of the Great Constable, and the constables of the King's castles, were executive rather than judicial, though, like them (Jeffrey's Roxburghshire, vol. ii., pp. 45, 47, 48), he may occasionally have exercised the powers of the Sheriff, or overruled his decisions. When the King had occasion to appoint a Lieutenant for a particular shire, it is natural to suppose that he would generally choose the *comes*, or lord of the district; and the term *vice comes*, by which our Latin writers always designate the Sheriff, would seem to indicate

that a more intimate relation than that which afterwards prevailed, subsisted originally between the offices of Lord-Lieutenant and Sheriff. At present they are entirely independent.'

'*Sheriff-Depute*.—The office of Sheriff having very early become hereditary (Ryley's *Placita*, 504; Chalmers' *Caled.*, i. 715; Innes' *Sketches of Early Scottish History*, pp. 399 and 465), and continuing to be so notwithstanding the provisions of the Act 1455, c. 44, it became necessary to provide, that if any Sheriff was unable or unapt to use and exercise his office in person, he should present to the King "ane sufficient depute," for whom he shall be answerable. (Skene, *de Verborum significatione*, and Acts quoted, *voce Schireff*.) These deputies, as well as their clerks, the Sheriffs were enjoined to send yearly, on 1st November, to the Lords of the Session, to be examined and admitted by them. It thus appears that the office of the original Sheriff-depute corresponded very nearly to that of the modern Sheriff-substitute; and in this position matters remained till the passing of the Heritable Jurisdictions Act in 1747.

'By that enactment (20 Geo. II., c. 43) the hereditary Sheriffs were abolished, and their judicial powers transferred to officers to be appointed by the Crown. These newly created Sheriffs were to hold their offices at first for a period of seven years, and afterwards *ad vitam aut culpam*. But the Crown retained the power of appointing Sheriffs for one year (sec. 5), who should exercise no jurisdiction (sec. 30), but who were to be known by the name of Principal or High Sheriff, titles previously unknown to the judicial nomenclature of Scotland.'

The Law and Practice of Citation and Diligence. On the basis of the late Mr Darling's book on the Powers and Duties of Messengers-at-Arms, and other Officers of the Law. By ROBERT CAMPBELL, M.A., Advocate, Fellow of Trinity Hall, Cambridge. Edinburgh T. and T. Clark. 1862.

FEW branches of law are so uninviting as that on which Mr Campbell has just produced a treatise. It is wholly dry and technical; like a mathematical calculus; and if it has anything to be said for it, it is that, like a calculus, its rules are rigid and precise, and unlike those of some branches of law which in their shadowyness frequently defy the grasp. Perhaps its principal interest, however, is the way in which its various rules present themselves as coming out of the past with modifications answering to changes in the social state. Most of them can only be fully understood through their history, to which, in every question of doubt, appeal must be made more directly than in the case of general legal principles. The historical development of a principle must, perhaps, in every case be understood, before we can rely with certainty on the range of its applicability; but in regard to forms, it may be said more especially, that a lawyer can only comprehend them clearly and intelligently in proportion as he knows exactly how they came to be what they are. In the latest are left traces—often very minute—of the language or

usages prevalent when the earliest came into existence; and these are certain to be sources of perplexity to all who are unacquainted with their growth. This connection between old and new forms gives a work on citation and diligence a peculiar interest at once for the antiquary and historian. The treatment of every division of the subject is, with a view to its proper exposition, necessarily historical. Starting from rude times, when buglers warned the people that the judges were in open air to hold their courts, and that all who had questions for judgment should bring their adversaries thither, we arrive at the nineteenth century with its rules for citation and execution fixed by Statute and Act of Sederunt, with official persons to perform them, and the most rigid system of written instructions to be complied with. In another field we leave behind the messenger with his blazon, horn, and wand, active in converting loving subjects of Majesty into rebels, in compliance with a legal fiction—‘making believe,’ with his horn to ‘raise the country’ against some miserable small debtor wringing his hands in his ingle-cheek—and arrive at a quiet gentleman in plain clothes, executing a diligence quietly, without blazon or bugle. No doubt it might be possible to produce a book on the law and practice of citation and diligence, which would contain no more than a statement of what is settled as law and recognised as form,—the one part a mass of rules rested on Statute, Act of Sederunt, and decisions, taken apart from their historical connection; the other an appendix of styles. But such a work would be of inferior interest and value,—would not, in fact, for the members of the higher grades of the profession, be of great use; for many of the rules are such as cannot be made to stand out clear apart from their derivation. Mr Campbell has attempted the historical treatment, and what he has attempted is what has long been wanted. The exposition of the law of diligence has been in arrear of the law, no work on the subject having appeared since Mr Darling’s; nowhere could the practitioner find brought together the new rules. It is likely enough that the nature of the subject, and the formidableness of the difficulties to be overcome in treating it, may have deterred many who thought of it from attempting its execution; many may have tried and despaired. Mr Campbell merits the thanks of the profession in having faced the task, and accomplished it, on the whole, well—perfection is nowhere to be expected. All we propose here to do is to give an idea of the contents of the work, and such an opinion of its execu-

tion as one may form on a rapid perusal. Every book of this kind must ultimately stand or fall according as it bears the test of 'working it,' which the profession is never slow to apply.

The work opens with an introduction, in two chapters, in which are signs of some scholarship and research. The first contains a glance at the old form of citation in use in Rome, followed by another at a still ruder system of legal procedure, which not very long ago prevailed in England. This we are tempted to quote:—

'In the *Comedy of Errors*, act^{iv.}, scene 2, there is a scene cited by Lord Campbell, in evidence of Shakspeare's legal education, which affords the English counterpart to the passage of Horace already given. Antipholus of Ephesus is arrested at the writ of a merchant for the price of a gold chain, which he denies having received. He sends Dromio to his house for a purse of ducats, to bail him with; and Dromio, in answer to the question from Adriana, "Where is thy master, Dromio? is he well?" answers,—

"No; he's in Tartar limbo, worse than hell:
A devil in an everlasting garment hath him,
One whose hard heart is buttoned up with steel;
A fiend, a fairy pitiless and rough;
A wolf; nay, worse, a fellow all in buff;
A back friend, a shoulder-clapper; one that countermands
The passages and alleys, creeks and narrow lands;
A hound that runs counter, and yet draws dry-foot well;
One that, *before the judgment*, carries poor souls to hell.

"*Adr.* Why, man, what is the matter?

"*Dro.* I do not know the matter: he's '*rested on the case*.'"

"Here," says Lord Campbell, "we have a most circumstantial and graphic account of an English arrest on *mesne* process [before judgment] in an action *on the case*, for the price of a gold chain, by a sheriff-officer or bum-bailiff, in his buff-costume, and carrying his prisoner to a sponging-house,—a spectacle which might often have been seen by an attorney's clerk. A fellow-student of mine (since an eminent judge) being sent to an attorney's office, as part of his legal education, used to accompany the sheriff-officer when making captions on *mesne* process, that he might enjoy the whole feast of a law-suit from the egg to the apples; and he was fond of giving a similar account of his proceeding, which was then constantly occurring, but which, like 'trial by battle,' may now be considered obsolete."¹

A notice is then given of peculiarities in procedure in Jersey; after which there follows a sketch of our own early practice,—on which, by the way, we may say, that we wish some learned antiquary would give us some more light than we possess. To a great extent, it is still an unexplored region of inquiry. The second chapter gives a history of the office of messenger-at-arms, and of the jurisdiction and forms of the Lyon Court. The way now being so far clear, the work thenceforth follows very nearly the arrangement of Mr Darling's book on the powers and duties of messengers-at-

¹ 'Shakspeare's Legal Acquirements,' by Lord Campbell, p. 39.

arms, with the addition of some chapters on subjects not treated by Mr Darling at all, as that of jurisdiction. So far as Mr Darling's book is familiar to the profession, it may be needless to be more specific. The chief differences in arrangement, and which may require notice, are in regard to citations,—which are here treated of in greater detail, the chapter relating to them being made a basis for the treatment of service of every kind of legal process,—and in regard to personal diligence. The formal arrangement of the work seems to have been somewhat interrupted, in order to treat consecutively the proceedings regulated by the Personal Diligence Act, 1 and 2 Vict., cap. 14. This Act was previous in date to Mr Darling's book, but had not then been well considered; and Mr Campbell has gone into detail in considering the bearing of the Act upon the forms previously in use, and its failure, in certain cases, to supersede the old forms with practical advantage. The chapters on personal diligence—12–17 inclusive—starting from the discussion of the changes effected by the Act, proceed to follow out the consequences of an ordinary debt, to poinding of the goods and imprisonment of the person, and till liberation in due course of law. After this, there is a falling back on the subject of charges other than those necessary for enforcing payment of an ordinary debt. So far, the personal diligence chapters operate an interruption; but we think more has been gained through bringing their contents together than has been lost through the interruption.

With regard to the execution of the work, we have already committed ourselves to the view, that Mr Campbell has, on the whole, performed his task well. So far as we can see, the recent decisions have been carefully studied and fully noted, though it is impossible but there must be omissions. The chapter on citations we think excellent; it is perhaps the most carefully executed and completest in the book. For the rest, we might find faults here and there, if so disposed; but what work is without them? Even Mr Dickson's valuable work on Evidence does not on all points stand the hard test applied to it by the working lawyer. Perhaps Mr Campbell might have devoted more space and labour to the subject of arrestments; we think he might. There are some omissions, too, which ought to be supplied in any future edition; for instance, when on the subject of caution in process of advocacy, some information should have been given regarding advocacy on juratory caution. But, on the whole, we think the profession will be satisfied that a

valuable addition has been made to the law library. We have said nothing as yet of the forms which are contained in separate chapters following the chapters of the text to which they belong,—an arrangement which we can hardly say we approve, though it is that followed by Mr Darling. The whole, we think, would have been better in an appendix, leaving the text clear. As regards the forms themselves, we observe, from the prefatory note, that they have been furnished almost entirely from the portfolio of Mr Drysdale, messenger-at-arms, who has also assisted the author in revising most of the proofs of the work. This is a guarantee, the value of which will be at once understood, that the practical part of the book is up to the highest mark,—Mr Drysdale being, in regard to such matters, an authority. His whole portfolio of forms seems to be printed here; and they may be followed with confidence, in the knowledge that they have all ‘stood fire’ more than once successfully.

THE MONTH.

Sheriff Russell, and the Procurator-fiscal of Wick.—Those who are interested in the maintenance of the system of the double Sheriffships have found it a rather difficult matter, of late years, to persuade the public of the necessity for perpetuating that ancient institution. In the prospect of a revival of the agitation for its abolition, Sheriff Russell, of Wick, has rushed into the gap to furnish his superiors with an argument for the continuance of the system.

The old political cry was, that Sheriffs-substitutes were inferior men, and therefore it was necessary that they should be subject to correction by the superior wisdom of a judge who was, by courtesy at least, a practising advocate in the Parliament House. An impression, however, had been gaining ground, that family influence more than merit, or even political services, was the avenue to success in the higher walks of the law, so far as that success depended on, or was assisted by public patronage; and, as a consequence, that many of the members of the bar who, for want of the necessary influence, had been induced to accept appointments to the local Sheriffships, were equal or superior in attainments to their judicial superiors. This pernicious heresy had actually taken so firm a hold of the public mind, that the office of Sheriff has been thought by some to be again in danger; a danger which could only

be averted by the immediate exhibition of a Sheriff-substitute of the genuine archaic pattern, and comporting himself in a manner suitable to the character which he was to assume,—that of an example, not to inspire, but to repel the confidence of the public.

Mr Russell has performed the part which party convenience, we hope, rather than natural aptitude had assigned to him, in a way that is not unusual with amateur performers of broad comedy; in short, he has overacted it. The occasion was judiciously chosen for the object in view, that of provoking public criticism; and the subject of his tirade, an attack upon his judicial superior, was calculated to disarm suspicion as to possible complicity with the Sheriffs-principal, to whose faded lustre he was willing to serve as a foil. If additional proof were wanting to demonstrate the real nature and motive of the escapade, it is found in the circumstance that Mr Russell himself, as we have been informed on reliable authority, actually wrote out and sent to the local newspapers a report of his speech, in the terms which we shall now quote, and from which the reader may judge for himself whether our observations are not well-founded:—

Mr Malcolm MacLennan, recently appointed Procurator-fiscal of the county of Caithness, appeared at the ordinary Sheriff Court on Tuesday last (17th June), and presented his commission appointing him to the office. Sheriff Russell, in accepting the commission, addressed Mr MacLennan from the bench to the following effect:—‘Mr MacLennan—I cannot give the word welcome to you here. For the last six years and more the very serious criminal business of this county has been conducted with the utmost sobriety, steadiness, and thorough experience and skill; and I must say that it does surprise me it should be considered proper to supersede the eminently efficient official whom we have employed during that time, or to suppose that the bar of Caithness could not have supplied another. While, therefore, I cannot give you a welcome, I think it due to myself to state that whilst the whole practical work of the county is confided to me, the patronage is given to another; and when I can tell you that my practical experience of the discretion and ability of Mr Sutherland are such as I have stated, I can give you something more than my welcome. I shall pledge myself to give you my official and moral respect and support so long as you deserve it. You have had nothing to do in the derangement of our proceedings beyond the acceptance of the high and lucrative appointment, the commission to which you have presented. Let me assure you, at the same time, that if you suppose that your appointment, while highly honourable and lucrative, is not to be obnoxious and invidious, you must lie in a more pleasant bed of roses and tread a more easy path than your predecessors have done; but it is in these times, when obloquy is raised against you, that you will feel the benefit of my support.’

It is quite conceivable that Sheriff Russell, actuated by motives of personal pique, or by the desire of ingratiating himself with the ‘bar of Caithness,’ may have uttered something as foolish, or even as ill-natured, as the words he has here attributed to himself. The

difficulty is, how to account for his having published them. The supposition of complicity in a plan to make the office of Sheriff-substitute contemptible in the eyes of the public, absurd as it may appear, is at least more easy of belief than the inevitable alternative, which is, that Mr Russell, in publishing the tirade, believed that he was doing something which gave him a claim to public sympathy and respect.

It is perhaps superfluous to say that no grounds exist for the reflections that Mr Russell has chosen to make upon the appointment of Mr Maclellan to the office of Procurator-fiscal. Mr Maclellan is well known in the profession as an influential and much respected practitioner in Inverness. For several years he held a commission as Procurator-fiscal in that county. For a portion of that time, he discharged the duties of the office without any assistance from his principal, and with great efficiency; and on the retirement of the late Fiscal, it was generally expected that he would have been promoted to the vacant office. On the present occasion, we believe the appointment was offered to Mr Maclellan without solicitation; and the fact that, in accepting the office, he necessarily relinquished a more lucrative practice in his own county, is alone sufficient to rebut the insinuation that the rights of patronage had in this instance been unfairly exercised.

In accepting that view of Mr Russell's unfortunate attack which is least disparaging to his understanding, may we venture to express a doubt whether it was necessary for the learned gentleman to descend so far, in order to convince the public that there are Sheriffs-substitutes extant whom it would not be safe or expedient to invest with a higher responsibility? The spectacle of a judicial functionary converting the bench into a rostrum for the fulmination of diatribes upon patronage would have been sufficiently painful and alarming, even had the opinion of the censor been delivered in the language of moderation and courtesy. But Mr Russell, it would seem, is not content to leave anything to inference. Like a certain personage, he must "write himself down an ass," in legible characters, lest no one else should be found to do him the favour. It must be satisfactory to the learned Sheriff to be informed, that the three honorary letters which he insists on conjoining with his name have seldom found a more appropriate resting-place; and he may rest assured that no one will be inclined to dispute with him the possession of the monogram.

Agents for the Poor.—If there is one class more abused than another, it may fairly be said to be the legal fraternity. The doctor is lauded highly for his humane and philanthropic feelings. ‘Be kind to the doctor, for he is kind to the poor,’ is quite a common saying. Whether that good opinion is reciprocal on the part of the medical profession toward their patients, is another thing; probably the statement of one distinguished member of that body may be conclusive: ‘They call us in like angels when they are sick, but they kick us out like devils when they are well.’ The lawyer may sometimes be disposed to entertain a similar idea of the gratitude of his client; but who ever heard of the legal profession being commended for their humanity? And yet, next to the doctor, no class does more for the poor.

By that quaint old statute, 1424, c. 24, every ‘pure creature’ is entitled to the benefit of counsel; and by Acts of Sederunt, the latest of which is 21 Dec. 1842, agents are appointed annually to conduct or defend suits in behalf of indigent persons. It is to two or three hardships that the agents so appointed are subjected, that we wish for a moment to call attention. Before doing so, we may be permitted to say, that the agents for the poor invariably discharge their duty as faithfully and ungrudgingly as if they were paid for their labour. It is not in regard to their time or skill that we now speak; these are given cheerfully. But in prosecuting the claims of the poor, they are obliged to pay sometimes a great deal of hard cash out of their own pockets.

Let it be supposed that a case is remitted to one of the agents; it involves a question of title to property. He finds that his first duty is to search the records; but although he offers his own services, he is not permitted to proceed with the search, until he has paid, or undertakes to pay, the usual fees. By 1 and 2 Vict., c. 118, persons pursuing or defending *in forma pauperis* are exempt from the usual dues to the clerks and officers of Court. If the Court cannot exempt the agents from outlay beyond the fees of those over whom they have a control, then, why should other outlays not be provided for otherwise? Why should they not come out of the fee fund, which yields a revenue to the Government after paying all the expenses exigible from it? But suppose the case proceeds, and ultimately is sent to a jury, the agent must cite witnesses, pay them, pay for their citation, and (we shall suppose the case is lost) pay the jury, and also for citing them. This appears really to be

too hard upon the *poor* agent. If he contributes his skill and time, and the services of his clerks, that should be enough.

It is perhaps easier to state this grievance than to suggest a mode whereby it may be obviated. But we do not see why the officers who cite the witnesses and jury should, in the circumstances, be entitled to payment at all. They are officers of Court, and ought to fall within the Act above cited. As regards the jury, a more difficult question arises. They might, in one sense, be considered 'officers of Court' as soon as they were empannelled, and so, in the event of their deciding against the poor litigant, should receive no pay. If they decided the other way, some censorious individual would immediately say they (a British jury!) had given the verdict for the pauper, in order to get their pay! Well, with the view of avoiding any such insinuation, let the jury give their services *gratis*, where either of the parties is on the poor's roll. If professional men are to have their time and talents taxed for behoof of the poor, it is impossible to conceive what good objection could be stated by the merchant, farmer, or country gentleman sitting one day in the jury-box. Should they consider it too great a sacrifice, what will they say to the law agent, a young man beginning business,—because the appointment devolves upon the junior members of the body—to have his services, and these are often laborious, crowned with having to defray the whole costs of a jury trial? There is only one thing that can be said in defence of holding the poor's agent liable for these expenses; to put it in the strongest way, it is a wholesome check upon him against reckless litigation. This might be urged with some plausibility; but it would require first to be shown that, as a general rule, there was any necessity for such a check. That there have been instances of reckless litigation on the part of agents, cannot be denied. You find also reckless merchants and bankers; and it appears to be nothing short of an unjustifiable affront to the profession to say that the young legal practitioner must be curbed by such a legal penalty. If he is disposed to speculate in lawsuits, he will find little difficulty, we dare say, in gratifying his propensity without resorting to clients on the poor's roll. But, after all, this suggestion has little applicability, when it is remembered that the cause is remitted to the agent, not to consider whether there is a good case or not, but to *proceed*, so that he has no alternative but to carry on the suit to an issue, whatever that may be.

Burdens of a pecuniary nature are also laid on agents for the poor in criminal business. They have often to travel into the country some distance to precognosce witnesses, pay their expenses, and also the witnesses for attendance. We refer not merely to agents here, but throughout Scotland; and the expense of attending circuit, and bringing witnesses, is frequently no trifle. This deserves the attention of the Crown.

Legal Appointments.—The professional appointments that have fallen to the disposal of the Government during the past six weeks of the session, have been, if not very important, sufficiently numerous, we should think, to satisfy the demands of the class who, in Edinburgh circles, are considered to have a vested interest in the distribution of patronage. We shall merely enumerate them. First in importance, is the appointment of Lord Jerviswoode to the highly responsible, but not lucrative office of one of the Lords Commissioners of Justiciary. This appointment is consequent upon the retirement of Lord Ivory from the bench of the Criminal Court, in consequence, we regret to learn, of continued indisposition. Lord Jerviswoode had considerable experience in criminal practice, first as an advocate-depute, afterwards as Sheriff of Stirlingshire, and ultimately as Lord Advocate. As a judicious and sound criminal lawyer he has few equals on the bench; and we feel assured that the appointment will prove a most satisfactory one. The appointment of Mr Wilson to the substitute Sheriffship of Kincardine, and of Mr Sheriff to Haddington, have been already noticed. The appointment of standing counsel to the Commissioners of Woods and Forests, etc., has been given to Mr Thomas Ivory. The vacancy in the Sheriffship of Ayr, we believe, has not yet been filled up: it is understood to lie between Mr William Ivory, the senior Advocate-Depute, and Mr N. C. Campbell; but we have good reason to believe that Mr Campbell, whose appointment, we believe, would be very acceptable to the county, will be selected. The retirement of Mr Swinton from the chair of Civil Law in Edinburgh created a vacancy in that office, which has been filled by the election of Mr Muirhead,—a high, and, we think, a merited compliment to an accomplished member of the junior bar.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

MUNRO *v.* EASTER ROSS UNION, ETC.—*May 28.*

Contract—Liquidate Damages.

The pursuer, Donald Munro, builder and contractor, Tain, sues the defenders for certain sums alleged to be due to him under a building contract between him and the board of management of the Easter Ross Union, dated 17th August 1848. By the contract, the pursuer undertook to erect, by the 1st September 1849, a common poorhouse for the nine parishes comprised within the Union. The contract price was L.2475, payable by fixed instalments, on certain stages of the work being completed, and the balance being payable on the completion of the work to the satisfaction of the inspector. The contract contained a clause in these terms, viz.: 'And the said Donald Munro engages to complete the work within the period aforesaid, under a penalty which it is hereby agreed shall be considered stipulated damages, not subject to modification, of L.5 sterling for each week after the said date (9th September 1849) until the completion of the work.' On completion of the works, on 15th May 1850, the balance due to the pursuer was L.744, 18s. 11d., payment of which was offered under reduction of L.175, as liquidate damages due by the pursuer for thirty-five weeks' delay in completing his contract, being at the rate of L.5 per week. The pursuer, although he at first declined, ultimately accepted payment in September following, under deduction of the penalty, but with a reservation of his legal claim to full payment, the Board having refused to adopt the recommendation of the Parochial Boards of six of the nine parishes within the union, that the penalty should be remitted, or at least mitigated. The present action was therefore brought against the Board of Management and their constituents, the Parochial Boards of the several parishes, to recover payment of the L.175 deducted as damages, and interest thereon, besides interest on the third instalment for the period between 26th November 1849, when due, to 18th January 1850, when paid. The pursuer's averments on record were in substance as follows:—The contract restricted him to a quarry in Caithness for the flagstones required in connection with the foundations, and that in consequence of the difficulty and delay in procuring these flags, he at first declined to sign the contract, but was induced to do so by the assurance of the Board that 'he had nothing to fear, as he was dealing with gentlemen,' which was meant as an engagement not to exact the penalty for delay not arising from the pursuer's fault. In the winter 1848-49 the building was delayed in consequence of a vessel having been lost when carrying stones for the purposes of the building. The pursuer then commenced and carried on the works without delay until 15th May 1850, when they were delivered over to the Board's in-

spector of works. The poorhouse was not occupied until October 1850, five months after its completion (a fact admitted by the defenders), and no loss or damage had been sustained by them in consequence of the works not being completed until May 1850. The pursuer maintained in point of law (1) That having been prevented by inevitable accident, and other causes over which he had no control, he was not liable in penalty ; (2) That no loss or damage having been sustained by the defenders, no penalty was exigible ; (3) That in any view the penalty was excessive, and should be restricted to the actual loss sustained ; (4) That the defenders were not entitled to exact the contract penalty in consequence of the verbal agreement not to do so if the delay was not imputable to the pursuer's fault.

The Lord Ordinary allowed issues ; but the Court recalled the interlocutor, holding that the pursuer was bound by his agreement, and that proof of a verbal agreement not to enforce was inadmissible.

Pet.—ANDREW SHEILLS, FOR DISCHARGE—*May 30.*

Bankruptcy—Discharge.

This was a petition for the discharge of a sequestrated bankrupt. He was sequestrated on his own petition, with concurrence of John Sheilla, farmer, Myles, near Tranent, his father, on 18th March 1859. After the lapse of three years, he applied for his discharge. This was opposed by five of his creditors out of twenty-one. The gross amount of the debts was stated to be L.1150. They opposed on the grounds that the bankrupt had not made a fair surrender and discovery of his estate. From his examination, it appeared he had been a potato merchant, buying in Haddington and selling at Newcastle, and he stated that his bankruptcy was caused by his brother, who sold for him in Newcastle, refusing to pay him a debt of L.1010, due to him upon the whole business transactions down to his sequestration. From another part of his examination, it appeared that he ceased to have business transactions with his brother in February 1858, and at that time a state was made up showing that L.426 was divisible between him and his brother. The examination did not disclose how the difference between the half of the last sum and the larger sum of L.1010 was to be accounted for. It was stated that the trustee had been unable to make anything of this debt, and that his brother denied that it was due. Another ground of objection was that the only asset on the estate was L.3, 16s., and the expense to which the trustee had been put was L.4, 5s. There had been no dividend, and no composition offered ; but the trustee upon his estate had given a favourable report to the bankrupt. In these circumstances, Lord Ormidale had found the bankrupt entitled to his discharge, stating that nothing sufficiently tangible to support these objections could be found by him in the examination of the bankrupt and in the sequestration proceedings.

To-day, the Court unanimously recalled this judgment, the Lord-President stating that the grounds of the application were not satisfactory, while those of the opposition were ; that the bankrupt's motive for setting up the large debt alleged to be due by his brother was that he had to balance the claims against him and to account for the loss of his creditors' money.

DINGWALL'S TRUSTEES v. EDMOND—June 4.

Reduction—Bankruptcy.

The defender is Francis Edmond, advocate in Aberdeen, and trustee for behoof of Lord Kintore's creditors, and the pursuer is the trustee on the sequestrated estate of Walter Dingwall, sometime factor to Lord Kintore, and tenant of the farms of Dumforbes and Honeyhive, on Lord Kintore's estate of Haulkerton. The object of the action is to reduce or give redress, by way of damages, for a renunciation by Dingwall of the lease of these farms in favour of Lord Kintore and his creditors. The grounds of action are very indistinct and obscure, owing to the unsatisfactory state of the record, which was remarked on by the Court both during the debate and at the advising, Lord Deas observing that neither party at the writing of the record seemed to have had any idea of the case they were to maintain before the Court. Two issues were proposed; the first alleging that the defender, Francis Edmond, fraudulently procured the renunciation from Dingwall when he was insolvent, and the second alleging that the said defender purchased the renunciation by Dingwall within sixty days of bankruptcy, in violation of the Act 1696, cap. 5, to the injury of Dingwall's creditors. These were the grounds of action mainly insisted on. The Court unanimously disallowed the issue, under the Act 1696, cap. 5, as there was no averment that the renunciation was for a prior debt, but, on the contrary, that it was gratuitously; and they allowed the pursuer to give in another issue as to fraud.

Lord Deas indicated an opinion that the pursuer's only remedy was not damages, but the reduction of the renunciation, and of the new lease, so as to reinstate him in Dingwall's place; also that the allegation that Edmond had, in the position of trustee for Dingwall's creditors and Lord Kintore's creditors, sacrificed the former to the latter in regard to this lease, was a ground of action against him personally, but not as trustee for Lord Kintore and his creditors.

WALLS v. CONNELL AND BELL—June 5.

Arbitration—Reduction of Decree.

This was an action of reduction of an interim decree-arbitral on the ground of corruption. The pursuer, William Walls, merchant in Glasgow, in February 1858, bought from the defender, Mr Connell, accountant in Glasgow, a house in Glasgow then in course of erection. The price was to be paid by instalments of not less than L.100 'as the work proceeds to the satisfaction of Mr William Wylie, builder, Glasgow, and as the same shall be authorised by Mr George Bell, architect in Glasgow (the other defender), but under deduction always of such sums of penalty as shall be awarded by the said George Bell under the reference hereinafter expressed.' By the contract, it is declared, 'any difference that may occur between the parties as to the finishing, or generally under these presents, is hereby referred to the amicable decision and final sentence of the said George Bell as arbiter, mutually chosen between the parties.' After the work had proceeded a certain way, and various payments to account had been made, the pursuer judged it necessary to resort to the submission clause of the contract. On 29th June 1858, he lodged a minute, praying the arbiter to award him certain penalties for the delay in completing the house. Afterwards the arbiter ordained the pursuer to

make certain payments to Connell; and by interlocutor, dated 24th August 1858, ordained him forthwith to pay Connell L.120. This action of reduction was thereafter brought of this interim award, and of the submission itself, but the pursuer restricted his conclusions to reduction of the interim award. He proposed two issues, one raising the question of *ultra vires*, the other of corruption. His grounds for the first were, that the award was pronounced without the arbiter inquiring whether the work was proceeding to the satisfaction of Mr Wylie, and without considering the pursuer's claim for penalties, and therefore was *ultra vires*. The alleged corruption consisted of the arbiter having transacted with Connell without the pursuer's knowledge, and having become guarantee for the price of the marble chimney-pieces, amounting to L.17, 10s., whereby, it was alleged, the arbiter acquired an interest to award money to Connell to pay the marbles, and thus discharge his own guarantee.

The defenders consented to a proof on commission before answer, but the pursuer refused to consent, and craved approval of his issues. The Lord Ordinary reported the case, intimating an opinion that the pursuer was not entitled to an issue of *ultra vires*, and expressing doubts how far he was entitled to one on the ground of corruption.

To-day, the Court unanimously dismissed the action as irrelevant. It was a very peculiar action. It sought to cut out and reduce an interim award from a submission, while leaving the submission itself subsisting. This was not actually incompetent; but it would require very precise averments to support such an action. All the averments here were vague and indefinite. It would never do to expose submissions to challenge on such grounds. The alleged guarantee of the arbiter was only to accelerate the execution of the contract, and the amount was such a trifle as to make the whole affair ridiculous as a ground on which to establish a case of corruption.

LEITH v. LIEUTENANT-COLONEL R. W. D. LEITH AND OTHERS.—*June 5.*

Entail—Aberdeen Act—Shootings.

The questions here arise as to bonds of provision under the Aberdeen Act 5 Geo. IV., cap. 87, burdening the entailed estates of Freefield and Glenkindie to the extent of L.7000, or at least three years' rent; and the following points for opinion were sent by the First Division to the whole Court:—

‘Whether, in calculating the amount of the provisions in favour of the younger children, the yearly rents or values of the following subjects, or any, and which of them, are to be taken into computation, viz.:—

‘1st, The mansion-house, offices, garden, and policies situated on Freefield, and the mansion-house, offices, garden, and policies, situated on Glenkindie, or either of them?

‘2d, The right of shooting on the estate of Glenkindie?

3d, The right of shooting on the estate of Freefield?

4th, The fishing on the river Don?’

All the Judges were of opinion that the mansion-houses, etc., ought not to be taken into computation, and that the salmon-fishing ought to be. As to the shootings, which were unlet but valuable, there was a difference of opinion. The Lord Justice-Clerk, Lord Benholme, and Lord Neaves, with whom agreed the Lord President and Lord Curriehill, thought they

could not be included in the yearly rents or values; but the majority, consisting of Lords Cowan, Ardmillan, Mackenzie, Kinloch, Jerviswoode, and Ormidale, with whom Lord Deas concurred, held that they ought to be included. The substantial ground of the majority was the large money value of rights of shooting when let. The ground of the minority was that the right of shooting is not a right of property.

Pet.—CAMPBELL v. BECK.—June 11.

Sequestration—Competition—Trust.

This was a petition by creditors of Alexander M'Farlane, sometime of the Caledonian Hotel, Glasgow, for sequestration of his estates. M'Farlane opposed the application on the ground that so far back as October 1860, he had executed a trust-deed conveying his whole estates to James Torrens and others, as trustees for behoof of his creditors, and that these trustees had entered into possession of the estate and carried on the business of the hotel, and that the petitioners were acceding creditors to this trust, as well as all the other creditors, with the exception of two heritable creditors. The reason given by the petitioners for now craving sequestration was that these heritable creditors had executed a poinding of the ground, and would carry off the moveable effects on it if they were not stopped by a sequestration. The Lord Ordinary (Ormidale) held that by acceding to the trust-deed the creditors had barred themselves from demanding sequestration, and that it seemed most inequitable 'that the petitioners and other creditors who acceded to the trust who had taken and kept possession of the respondent's whole means and effects since October 1860, during which they speculated and traded with the same for their own advantage and according to their own views, without any control or interference whatever on the part of the respondent, should now be allowed, when they find that the heritable creditors are not to delay longer in taking the ordinary and necessary measures available to them to make their claims effectual, to throw the trust arrangement entirely aside, and thereby destroy the rights acquired by the respondent under that arrangement just as if it had never been entered into.'

The Lord President said that the petition for sequestration was one in itself competent, and that the Lord Ordinary was bound to grant it except it was opposed on cause shown. M'Farlane had appeared to show cause why it should not be granted. The reason was that a trust-deed had been granted; but this trust-deed did not bind those who acceded to it, unless the other creditors agreed. It would be unjust to allow the heritable creditors who had not acceded, to carry off the moveables, by preventing sequestration; besides the trust deed itself contemplated the possibility of sequestration being necessary to carry out its object. The other Judges concurred.—Interlocutor altered.

TURNER v. M'LELLANDS AND OTHERS.—June 12.

Arrestment—Landlord and Tenant.

The petitioners for recall of arrestments are trustees for the Monkland Iron and Steel Company, and the creditors of that company. They were appointed in 1861, after this company had suspended payment, to wind up its affairs. The respondent is the proprietor of Barbauchlaw, of which estate the minerals were leased by the Monkland Iron and Steel Company in 1854, before the respondent became proprietor. By the lease, assignees

were excluded, but not sub-tenants, it being stipulated that in the case of a sub-lease, the principal tenants should still remain bound for the rent and other prestations. A sub-tack was granted in favour of the Messrs M'Lelland, for behoof of the company and its creditors, the principal tacksman being to be retrocessed on full payment. Mr Turner has raised an action concluding (1), for reduction of the sub-tack to the M'Lellands, as being, in fact, an assignation, and contrary to the lease; (2), for declarator that, by the insolvency of the company, the principal tack had terminated, and the minerals had reverted to him; and (3), for L.50,000 of damages for the illegal working of the minerals since 4th December 1861. The present petition is for recal of arrestments, which have been used on the dependence of this action. The Lord Ordinary (Kinloch) has recalled the arrestments, on caution being found to the extent of L.2000. Mr Turner reclaimed, contending that caution should be found to the full extent of L.50,000, or at least, to a larger extent than L.2000. The Court unanimously refused the reclaiming note, with expenses, holding that, in the circumstances, the Lord Ordinary had exercised a sound discretion.

DUFF v. TRINITY HOUSE OF LEITH AND OTHER INCORPORATIONS.—*June 14.*

Church—Stipend.

The pursuer of this action is the Rev. Henry Duff, minister of the second charge of South Leith, and as the seat-rents of the Church are not sufficient to pay him his stipend, he has sued the corporations of Leith as the parties primarily and permanently liable; and the Court has now found that they are so liable to him. Their obligations commenced in Roman Catholic times, when each corporation had an altar and supported a chaplain. When Protestantism was introduced, the corporations appointed one chaplain, and seated the church, and let the pews. By-and-bye the church was made the parish church, and the parish minister transferred as first minister, while the chaplain became second minister. The Court held that the second charge thus became a benefice and an ecclesiastical corporation. Augmentations from time to time were then made to the benefice, and up to 1846, the stipend, as so augmented, was paid by the defenders. In that year an Act was passed taking the seat-rents from the incorporations, and giving them to the kirk-session to pay the stipend of the minister of the second charge; but this arrangement was in the Act itself declared only to be in farther security of the stipend. The Court have held that the obligation originally imposed was in no way affected by this Act of Parliament; and that as the additional security it had afforded was inadequate, the primary obligants must make up the difference to Mr Duff. As there are matters of accounting involved, the case was remitted back to Lord Jerviswoode, as Ordinary, and the pursuer found entitled to his expenses since the date of the interlocutor reclaimed against.

SECOND DIVISION.

HUME v. HUME.—*May 27.*

Divorce—Proof.

This was an action of divorce, in which a question had arisen as to whether the defender was subject to the jurisdiction of the Court. The pursuer moved for a proof of the jurisdiction, which the Court were will-

ing to grant, but a doubt arose as to whether the proof should be taken on commission or by the Lord Ordinary under the Conjugal Rights Act. Their Lordships, therefore, took time to consider the point.

To-day, the Lord Justice-Clerk said the Court were of opinion that the proof should be taken on commission, and not by the Lord Ordinary. The cases of *Tulloch v. Tulloch*, 23 D., and *Shaw v. Shaw* in 1850, settled that proof of jurisdiction was to be taken on commission, and not before the Sheriff-Commissaries, who took the proof on the merits in consistorial causes. The Conjugal Rights Act had substituted the Lord Ordinary for the Sheriff-Commissaries, but had done nothing more. The proof at present asked, therefore, should be taken on Commission.

Susp.—M'GREGOR *v.* LORD STRATHALLAN.—May 27.

Suspension—Decree of Absolvitor.

The suspender was tenant of Lord Strathallan's farm of Mossend. In February 1858 his Lordship presented a petition to the Sheriff of Perthshire to have M'Gregor interdicted from pasturing his sheep and cutting brambles on his plantations. M'Gregor then presented a petition to have the fences on his farm inspected and put in proper repair. The Sheriff conjoined the petitions and allowed a proof, after which he assoilzied Lord Strathallan from the conclusions of M'Gregor's petition, and granted the interdict prayed for by his Lordship. M'Gregor was also found liable in expenses, which were taken and decerned for at the sum of L.52, 14s. 8d. M'Gregor then presented, on juratory caution, this suspension, in which he prayed the Court to 'suspend the said pretended decree and charge, and whole grounds and warrants thereof.' Answers were given in, both on the merits and with a plea that the suspension was incompetent. The Lord Ordinary on the Bills (Jerviswoode) refused the note, holding that in so far as it related to the petition at M'Gregor's instance, it was incompetent, and in so far as it related to the petition at Lord Strathallan's instance, no sufficient grounds for passing it had been made out.

M'Gregor reclaimed, and counsel were heard.

The Lord Justice-Clerk said there could be no doubt that a decree of absolvitor pronounced *in foro* in an inferior Court could not be suspended, and that the same would hold in regard to a decree for expenses pronounced *in foro* following a decree of absolvitor, where such decree was sought to be suspended on grounds involving the merits of the decree of absolvitor. Whether such a decree for expenses could be suspended on grounds not involving the merits of the decree of absolvitor, was a different question, on which he gave no opinion. In the present case, however, there was this peculiarity: that these were conjoined actions, in one of which it was true, decree of absolvitor had been pronounced, but in the other interdict had been granted. Such a suspension, he thought, was not incompetent, and the remedy sought might have been given, whether in whole or in part he (Lord Justice-Clerk) would not say, had the note been presented on caution. It had, however, been presented on juratory caution only, and he was satisfied that sufficient grounds had not been stated for passing the note on such caution only. The proof sufficiently showed that the suspender had accepted the fences in the state in which he found them without any objection. It was also proved that his sheep were trespassing on Lord Strathallan's plantations, and that he was cut-

ting the briars and brambles there without right to do so. The Sheriff's judgment was, therefore, quite right, and, on the whole, he (Lord Justice-Clerk) was for adhering substantially to the interlocutor of the Lord Ordinary, refusing the note, with expenses.

Lords Cowan, Benholme, and Neaves, concurred.

LORD ADVOCATE v. M'DONALD.—*May 28.*

Succession-Duty—Annuity.

This was an information by the Lord Advocate claiming L.795, 4s. 9d. as succession-duty from Mr M'Donald of St Martin's. The late Mr M'Donald of St Martin's executed a trust-deed conveying his large heritable and moveable estate to trustees for certain purposes—one of which was the payment of an annuity of L.1000 to his widow. He died in 1841, and the trustees, in execution of their powers, made over the trust estate to the present Mr M'Donald, he becoming bound to pay the widow's annuity as long as she lived. In 1855 she died; and it is not disputed that he, in consequence, had 'an increase of benefit' to the extent of L.1000 a year. The Crown claim succession-duty on said increase, under the 5th section of the 16th and 17th Vict., cap. 51. Mr M'Donald maintained that the duty was not due in respect that the termination of the annuity to which the widow was entitled was not a succession in the sense of the statute; and farther, that the annuity was not a charge, estate, or interest on the property of the defender nor a burden thereon, in the sense of the statute. The Lord Ordinary in Exchequer (Armillan) repelled the defences, and decerned against the defender for the duty claimed, on the ground that the increase of benefit derived by him from the termination of the widow's annuity was a succession in the sense of the statute. The defender reclaimed, and without calling on the counsel for the Crown, the Court adhered.

Susp.—**HUNTER v. MILLER.**—*May 30.*

Landlord and Tenant—Rotation of Crops.

Mr Hunter of Thurston presented a note of suspension and interdict against Mr Miller, one of his tenants taking away a way-going crop, other than a white crop, to an extent of 300 acres. The tenant contended that in addition to a white crop of 300 acres, he is entitled to take away a way-going black crop of 100 acres, to consist of potatoes, beans, etc., or such like. The lease under which the present question arises was executed in 1839 between the late Mr Hunter of Thurston and the respondent's father, and superseded a previous lease between the same parties during its currency. The lease stipulates that the tenant, besides observing the rules of good husbandry, shall be bound 'never to have more than one-half of the arable land in white crop in the same season, nor to take two white crops off the same field without a green or a black crop intervening, and to take only one black crop, such as hay, beans, potatoes, and the like, between grass and grass.' The tenant was also bound 'to leave at the end of the lease the turnip or fallow breaks once ploughed for the incoming tenant.' Until the last year of the lease, the tenant adopted the four-shift or five-shift rotation, and for that year he adopted the six-shift. The landlord contended that he was not entitled to alter the system of cultivation during the last year of the lease, to the

effect of carrying away a larger way-going crop than he would have got under the system previously adopted. On a remit by the Court to Mr Hope, Fentonbarns, he reported that if the lease prevented a six-shift rotation, the landlord's interest would be prejudicially affected by the farm being left under that course of cropping; as, at the Whitsunday of the tenant's removal, the landlord would only receive and enter to 100 acres of grass and 100 acres of fallow, while under a four-course shift he would be entitled to 150 acres of grass and 150 acres of fallow, and under a five-course shift to 240 acres of grass and 120 acres of fallow. If the lease allowed a six-shift rotation, the landlord's interest would not be prejudicially affected by the tenant following a four-shift or five-shift rotation during the whole years of the lease till the last, and then laying out and dividing the farm for the last crop as under a six-shift rotation.

The Court to-day, affirming the judgment of the Lord Ordinary (Ardmillan), held that there being nothing in the lease to prevent the tenant adopting throughout the six-shift rotation, and Mr Hope having reported that the landlord was not prejudiced by a different course having been followed in the previous years, and the six-shift adopted in the last, the landlord was not entitled to prohibit the tenant from taking the advantage the six-shift might give him if adopted in the last year. The clause in the lease binding the tenant 'to leave the turnip or fallow breaks,' must be held to refer to that proportion of the farm which, according to the six-shift rotation, the tenant would have in turnip or fallow. The 'turnip or fallow' must be held to mean turnip or bare fallow, and it would be inconsistent with the terms of the lease, which contrasted turnip and black crop, and with the previous leases between the parties, to include black crop under the general words 'turnip or fallow breaks.'

Adm.—SIM v. GRANT AND OTHERS.—June 2.

Sale—Mercantile Law Amendment Act—Reputed Possession.

On 15th June 1859, William Sim, carpenter, Grantown, purchased from John Grant, Westend, Grantown, a mare, cart, wheels, and harness, at the price of L.11, 18s. 9d. Prior to this sale, the mare and effects had been poinded by a creditor of the seller, and on the date of the purchase the price was paid by Sim, at Grant's request, to the poinding creditor. Sim did not take delivery of the mare, but allowed her to remain in the possession of Grant, who, by the minute of sale, became bound to deliver her to him at any time when required. Grant, the seller, not only retained the possession of the articles, but was also allowed, and, in point of fact, used and enjoyed them as his own. In the beginning of December 1859, while the mare was still in the possession of Grant, she was poinded by the Rev. W. Grant, Duthill, one of his creditors. Immediately after this poinding, Sim intimated to the messenger that having purchased the mare, he was entitled to delivery. Notwithstanding this intimation, the Rev. W. Grant advertised a sale of the mare under his diligence, whereupon Sim presented an application to the Sheriff of Inverness-shire for interdict against the sale. A proof having been allowed, the Sheriff-substitute granted the interdict; but this was recalled by the Sheriff. Sim then presented a note of advocacy, and the Lord Ordinary (Mackenzie) reversed the judgment of the Sheriff; and

holding that under the first section of the Mercantile Law Amendment Act, 19 and 20 Vict., cap. 60, the mare, at the date of the poinding complained of, was not liable to be poinded at the instance of the Rev. W. Grant for any debts alleged to be due to him by John Grant, to the effect of preventing Sim, as purchaser of the mare, from enforcing delivery thereof, granted interdict against the sale. The Rev. W. Grant having reclaimed, the Court were of opinion that no proper question of reputed ownership was raised in the case; and farther, that the Mercantile Law Amendment Act, sec. I., did not apply to a transaction where not the bare custody only, but the use and enjoyment of the subjects sold, remained with the seller. They therefore held that it was quite competent for John Grant's creditors to poind the mare, and that the interdict against the sale must be refused.

CHARLES GRAY v. M'HARDY AND OTHERS, MEMBERS AND MANAGERS OF THE TRADES' WIDOWS SUPPLEMENTARY FUND OF ABERDEEN.—June 4.

Res Judicata.

This is an action of declarator and reduction, at the instance of a member of the society, to have the minutes and resolutions authorizing the dissolution of the society, and payment of the attendant expenses, judicial and extra-judicial, out of the society's funds, reduced, and the appropriation of the funds to pay such expenses declared to be illegal and *ultra vires*, and for repetition from the defenders of sums so expended. The defenders pled, *inter alia*, *res judicata*, in respect the pursuer was bound by a final judgment of the Court in 1859, by which the defenders were assoilzied from conclusions of declarator and reduction precisely the same as those in the present action.

The previous action was at the instance of Alexander Milne, a member of the society, and was directed against the members and managers. Its conclusions were for reduction of resolutions of the society, authorizing its dissolution, and the appropriation of funds for that object, and for declarator, that it was *ultra vires* of the defenders to apply any of the society's funds towards payment of any expenses incurred with regard to the illegal attempt made to dissolve the society, and for repetition to the society of sums so disbursed. In that action, the Court (adhering to Lord Mackenzie's interlocutor) assoilzied the defenders, and sustained their plea, to the effect that these expenses formed correct and proper charges against the fund. In the present action, the Lord Ordinary (Ardmillan) did not think it necessary to dispose of the plea of *res judicata*, but assoilzied the defenders, in respect of the previous decision, which he held to be an express authority in point.

The Court to-day recalled that interlocutor, and sustained the plea of *res judicata*.

The Lord Justice-Clerk said that it was obvious that the question raised and decided in the previous action was, whether the society or its members were entitled to pay out of the society's funds the expenses incurred in attempting to dissolve the society, whether in Court or out of it. The present action was an attempt to raise precisely the same point, and the only question was, Are the parties to the two actions so identified as to make the plea of *res judicata* applicable? In the previous action, the pursuer was a member or contributor, and sued in that character;

and the action was directed against the managers and members. In the present action the pursuer was a manager and contributor, and sued in respect of his interest in the association; and thus the same interest was represented by the pursuer in the one action as by the pursuer in the other, and the defenders were the same. There were, therefore, *termini habiles* for sustaining the plea of *res judicata*.

Lord Cowan concurred.

Lord Benholme said three things must combine to admit the plea of *res judicata*—identity of parties, of matter judged, and of grounds of judgment. Here the ground of decision, and the thing to be decided, were identical with those in the previous action. The pursuer, although not the same person as the pursuer in the other action, was identified in interest with him; and it was identity of interest, not of person, that must be looked to.

Lord Neaves also concurred. Instead of identity of ground of decision, he would substitute identity of *medium concludendi*, as one of the three things requisite to support the plea of *res judicata*.

M.P.—MONTEATH'S TRUSTEES.—June 5.

Trust—Administration.

The Misses Monteath left their property to trustees, for the purchase of an estate, to be called Kepp, and to be entailed on Major Archibald Monteath and his heirs male, whom failing, his brother, James Monteath Douglas. Major Monteath at his death bequeathed the sum of L.10,000 in the following terms:—‘I hereby leave and bequeath the sum of L.10,000 for the purchase of lands in Perthshire, to be called Arnmore, and to be added to the entail of the lands to be called Kepp, but, at the same time, held as a separate estate.’ James Monteath Douglas, who was appointed his sole executor and trustee, confirmed himself executor, and served himself heir to the Major’s whole estate, heritable and moveable, and intromitted therewith, without distinction of his own proper estate, continuing in possession of the joint-estate till his death, when he left his whole estate, including the Major’s estate, to trustees, who raised the present multiplepoinding.

The Court, in January 1860, appointed a judicial factor to administer the estate of Major Monteath separately from that of his brother James, with which it had got mixed up. The judicial factor, as coming in the place of James Monteath Douglas, in his character of trustee on the Major’s estate, claims the sum of L.10,000 bequeathed by the above codicil. The competing claimants are the present trustees of Misses Monteath, who contend that they are entitled to insist on this sum (which was bequeathed for the purchase of lands to be added to the entail of Kepp), being paid to them, in order to its being applied in the manner directed by the settlement and codicil.

The Lord Ordinary (Jerviswoode) preferred the judicial factor, holding that the duty of applying the bequest of L.10,000 in the purchase of lands was imposed on him as representing the Major’s trustee. His Lordship held that the direction contained in the codicil must be held to be addressed to the Major’s own executor and trustee, as the bequest was made with a view to carry out special purposes; and no authority was given to the executor or trustee to pay or make over the fund to

any other person or persons. Misses Monteath's trustees having re-claimed, the Court to-day, without calling on counsel for the respondents, adhered. They held that the words of the codicil, being words of bequest, if a legatee had been named, the executor would have had to pay the sum over to the legatee; and no legatee having been mentioned, but only a purpose, it must be held one of the purposes of the trust to be carried out by the trustee or executors. A legacy to the trustees under another settlement, *qua* trustees, was an entire novelty; and it was doubtful whether trustees had power, in that character, to accept a bequest made by a person other than the truster.

ANDERSON AND OTHERS v. LORD MORTON'S TRUSTEES.—June 6.

Process—Abandonment.

In this case, which involves a right of way, a minute, departing from certain conclusions of the summons, was lodged in 1851 before the record was closed. The record was subsequently closed, issues were adjusted, and decree given for the pursuers in terms of the issues. The Court, a short time ago, ordered the minute of abandonment to be withdrawn as incompetent. The pursuers now proposed to put in another minute of abandonment, in similar terms, departing from the conclusions of the summons on which issues had not been taken, and reserving right to bring a new action on the grounds departed from. They also asked expenses.

Lord Cowan held, that issues having been adjusted and approved of, there was an end of the whole cause embraced in the summons, and there remained nothing beyond the issues for judicial investigation and determination, and therefore nothing to abandon. With regard to expenses, the pursuers were entitled to them, subject to modification, up till the date when the line of road was finally adjusted. Since that date, expenses would be given to neither party. The other Judges concurred.

KNOX AND OTHERS v. CRAWFORD.—June 6.

Loan or Donation—Issue—Proof.

This was an action by the executors of the late Mr Burn for payment of certain sums alleged to have been advanced by them in loan to the defender. The conclusion is simply for payment of the sums lent. For two of the loans, written acknowledgments had been given to the deceased by the defender; but these acknowledgments are in the defender's hands. The case came before the Court on the question what was the appropriate form of issue, and whether it could be granted in this action.

The Lord Justice-Clerk said that the pursuers would first have to establish, with reference to these two loans, that the documents of acknowledgment ought to be in their possession, and not in that of the defender, the alleged debtor. He had some doubts whether this was a proper form of action to try such a question; but he did not wish, if possible, to put the pursuers to the expense of raising another action, more especially as the defender made no objection. He therefore thought the Court might allow issues to try this question. That was the only question as to these two loans; because, if the documents ought to be in the possession of the pursuer, the constitution of the debt was admitted by the defender, and it was not alleged to have been paid. He

would suggest an issue for the pursuers, putting it to the jury whether the defender granted the acknowledgments, and afterwards obtained possession of them without the debt being paid or otherwise extinguished. Under this issue the defender might prove donation without a counter-issue. The other Judges concurred.

BUCHANAN v. CULLEN.—June 6.

Advocate—Action for Fees—Relevancy—Jury Trial.

A summons was raised, at the instance of Mr John Cullen, W.S., against Mr William Buchanan, advocate, and his two sons, in which he concluded for L.2195, as the balance of a sum of L.2600 due under an agreement between the parties dated in 1857. This action was defended by Mr Buchanan, and a counter action was immediately raised by him, in which he concludes for count and reckoning for all sums received by the defender from his clients, or their opposing litigants, on account of fees charged by the defender as having been paid to the pursuer for professional services in the causes in which he was employed by the defender as counsel for the defender's clients between 1837 and 1859. The pursuer states that about two months before the institution of the present action, he ascertained that sums of money to a very large amount had been received by the defender from his clients, or their opposing litigants, as fees paid by him to the pursuer, which have never been so paid or accounted for; and that in almost all the causes in which the pursuer was employed as counsel by the defender from 1837 to 1859, the sums sent to the pursuer as fees were fewer and of less amount than those that were charged and were actually received by the defender on his account as fees paid to the pursuer. Mr Buchanan goes on to give detailed instances in support of this general averment. He asks for an exhibition of accounts, and for payment of the sums charged by the defender as fees, deducting those actually paid to the pursuer; and, anticipating a defence founded on the deed of agreement, he adds reductive conclusions as applicable to that deed, on the ground that he was induced to enter into it by the fraudulent concealment and false and fraudulent representation of the defender, and that he was under essential error as to the existence of the balance of fees due to him.

The defender having contended that the action should be dismissed as irrelevant, counsel were heard on that point.

The Lord Ordinary (Jerviswoode) was of opinion that the important and delicate questions involved could not be decided on the statements on record without investigation into the facts, and therefore ordered issues.

Mr Cullen reclaimed.

At advising, the Lord Justice-Clerk said that if the conclusions for count and reckoning depended entirely on the pursuer's success in his reductive conclusions the natural order for the Court to follow would be to consider the reasons of reduction first. But it was conceded by the defender that although the reduction was unsuccessful, the conclusions for count and reckoning would still apply to the two last years of the period in which Mr Buchanan and Mr Cullen stood in the relation of counsel and agent, the agreement sought to be reduced being dated in 1857. It was therefore necessary to consider, in the first place, that

part of the conclusion for count and reckoning which did not depend upon the reduction, and that involved the question whether Mr Buchanan was entitled, on the grounds libelled, to sue for counsel's fees. The question raised was novel and very important, and his Lordship was most unwilling to determine it without being quite clear on the facts to which the law was to be applied. He would give no opinion or indication of opinion on the law till he knew the exact state of the facts. He came substantially to the same conclusion as the Lord Ordinary, that an investigation was necessary, but he did not agree with him as to the mode of investigation to be followed, being decidedly of opinion that this was not a case to be submitted to a jury. It was a common opinion that questions of fraud should properly be left to a jury. This was very true in some cases of fraud, such as fraud in mercantile matters, where the question submitted to the jury was one as to fair dealing. But there were other cases of legal fraud, or fraud in the eyes of the law, which depended more on a nice discrimination of legal principles than on a balance of evidence, and to which jury trial was inappropriate.

The other judges concurred.

Declr., WILSON v. STEWART OR HAGART AND OTHERS.—June 6.

Right of Way—Issue.

This is an action of declarator of a right of public way through the lands of West Forth, in the parish of Carnwath. The pursuer proposed an issue describing the course of the road in so far as it is within the property of the defender, and as proceeding from thence to the public road leading to Mid-Calder. The defender contended that the pursuer was bound to state more specifically the course of the footpath after it leaves the defender's lands. The Court gave effect to this contention, and adjusted the following issue:—

‘Whether, for forty years and upwards, or for time immemorial, there has existed a public right of way for foot passengers from the village of Mid Forth, or from a part of the public road known as the Carluke Road, at or near the said village, leading in a north-westerly direction through two fields, forming part of the said lands of West Forth, and respectively known as Cant's Moss Park, and the Mid Park, to a point 212 yards, or thereby, eastward from the north west corner of the said Mid Park, and from thence proceeding *through the farms of Abbey, Birneyhall, and others, to a point about equi-distant from the farm houses of Brow and Rowantree, of the public road leading from the villages of Daviesdykes and Buncle by Headless Cross to the town of Mid-Calder?*’

The italics show the additions made by the Court to the issue as proposed by the pursuer.

Pet., KYLE AND OTHERS.—June 10.

Summary Petition—Inner or Outer House.

This was a petition for the recall of the appointment of a *curator bonis* to a lunatic, for his exoneration and discharge, and for the appointment of a new curator in his room. The curator was appointed by the Junior Lord Ordinary in 1860, and he asks his recall because he is about to leave the jurisdiction of the Scotch courts. The petition was presented to the Inner House on the ground that the Distribution of Business Act

(20 and 21 Vict., c. 56), to the Junior Lord Ordinary, which transferred petitions for appointment of judicial factors, and for their exoneration and discharge, omitted to make any provision for the transference of petitions for the recall of their appointments. The Court, however, held that a petition, in the circumstances of the present case, ought to go in the first instance to the Junior Lord Ordinary. Their Lordships held that the recall was only incidental to the exoneration and discharge, and, therefore, that it was covered by the fourth head of the fourth section of the statute. Their Lordships at the same time indicated an opinion that whenever an appointment had been made by the Inner House, or whenever it was sought to remove the factor on the ground of malversation, or to recall his appointment on the ground that the alleged lunatic was sane at the date when it was made, the petition to recall must be presented to the Inner House.

Susp., WINTON AND CO., AND THOMSON AND CO.—June 10.

Evidence—Reference to Oath.

This was a suspension of a charge on a bill in which the Court refused the suspension, held the letters orderly proceeded, and found the suspenders liable in expenses. The suspenders have now addressed a note to the Lord Justice-Clerk asking his Lordship to move the Court to sustain a reference to the oath of the charges contained in a minute of reference of same date with the note. The suspenders maintained, on the authority of the case of *Scott v. Livingstone*, 22d December 1831, 10 S. 174, that the minute of reference was incompetent, and that the reference could only be made in the form of an incidental petition to the Court.

The Lord Justice-Clerk stated that, after consultation with the judges of the First Division, the Court were of opinion that the minute of reference was competent.

BAYNE v. M'GREGOR.—June 14.

Reparation—Slander.

This is an action of damages for slander, at the instance of James Bayne, S.S.C., against Malcolm M'Gregor, S.S.C., on allegations which are sufficiently brought out in the issues approved of by the Court. On record it was, by a clerical error, stated that the slander was uttered on 10th January 1860 instead of 10th January 1861, but the Court allowed the error to be corrected. The following are the issues :—

- 'It being admitted that Jean M'Dougall or M'Call, wife of Peter M'Call, clothier, Comrie, and the said Peter M'Call presented a petition to the Court of Session for the appointment of a *curator bonis* to William M'Laren, residing in Comrie :
- 'It being further admitted that John Burnet, Esq., advocate, acted as counsel, and the defender as agent, for the said petitioners, and that the petition depended before Lord Jerviswoode, as Ordinary :—
- 'Whether on or about 10th January 1861, and within the Parliament House, the said John Burnet, as counsel for the petitioners, in conformity with the instructions of the defender, maliciously given, did, in the presence of a great number of persons, then in the Court-Room, and, among others, in presence and hearing of Charles Scott,

Francis William Clarke, and William Ludovic Mair, Esquires, advocates, or one or more of them, make to the Lord Ordinary a false and calumnious statement that the pursuer had procured the indorsation of William M'Laren, a lunatic, to a deposit-receipt; that he then went to the Commercial Bank, and, by means of protests and threats of actions of damages, attempted to get the money contained in the said deposit-receipt; and that his conduct was such as would justify a complaint to the Court, so that he might be censured—meaning thereby that the pursuer had procured or obtained, from a man whom he knew to be a lunatic, an indorsation to a deposit-receipt in the lunatic's favour, for the purpose of fraudulently obtaining payment thereof; and that he fraudulently attempted to use the said indorsation as a valid indorsation, by attempting to procure by virtue of it, and by means of protests and threats of actions of damages, payment from the bank of the contents of the said deposit-receipt—to the loss, injury, and damage of the pursuer?'
 Damages laid at L.1000.

MUIR v. B. COLLETT.—*June 17.*

Partnership—Liability—Jurisdiction.

This is an action for L.106, being the price of certain goods furnished by the pursuers to the firm of Hubbard, Collett, and Co., in Bombay, about the year 1845, and is directed against Mr Collett, as a partner of the said firm and as an individual. The firm of Hubbard, Collett, and Co., was composed of the defender and one other partner, Mr Hubbard, who is not subject to the jurisdiction of the Scotch Courts. The partnership was dissolved in 1847. The defender pled two preliminary defences—1. No jurisdiction; and 2. 'That the said action is incompetent as laid, in respect the pursuers have made no demand upon the firm alleged to be their proper debtor, and have neither called the said firm, nor any partner thereof other than the defender, and that the debt neither has been constituted nor is sought to be constituted against said firm.'

After a proof, the first plea of want of jurisdiction was repelled.

The Lord Ordinary (Jerviswoode) sustained the second plea, but the Court altered.

The Lord Justice-Clerk said that this second defence embraced two separate pleas—1. That the action was directed against a partner for a debt not constituted against the company; and 2. That all the partners were not called. To determine whether these pleas were applicable, the statements upon record must be looked to. The defender admitted on record that the goods were, on his order, consigned to his firm in Bombay, and received by them, and that he and Mr Hubbard were the sole partners of that firm, which was dissolved in 1847. His Lordship was of opinion that the preliminary defence could not be sustained, upon two grounds—1. That the company was a foreign company, whose domicile was in India, and whose partners were connected with India; and 2. That the company was finally dissolved in 1847. The objection that the debt had not been constituted against the society did not apply to the present case, as it did not appear, and was not averred, that, according to the law of Bombay, a company had a person against which debt

could be constituted. With reference to the second objection, that all parties were not called, the pursuer was no doubt bound to call all the partners if he could; but he was not bound to do what was impossible. The only partner subject to the jurisdiction of the Scotch Court had been called; and to require that the partner not subject to the jurisdiction should also be called would be to require an impossibility. Another consideration which strengthened his Lordship's view that this second plea could not be sustained was, that this was a dissolved company. In giving effect to the plea that all parties were not called—a plea founded on principles of equity—it would be strange to hold that a claim against a company which had been dissolved for nearly twenty years could not be made effectual unless all the partners could be found in one jurisdiction.

Note for JOHN KENNEDY, W.S.—June 19.

Diligence—Messenger.

The petitioner is about to raise an action in the Court of Session, and being desirous of arresting funds belonging to the defenders, in the Island of Lewis, for the purpose of founding jurisdiction, and also on the dependence, presented two bills praying for warrant to any of the sheriff-officers in Lewis to execute letters of arrestment *jurisdictionis fundandæ causa*, and thereafter to execute the warrant of arrestment contained in the summons about to be raised.

The grounds upon which it was asked that the arrestments should be executed by sheriff-officers, instead of messenger-at-arms, were, that there is no messenger-at-arms in the island of Lewis, and that the expense of taking a messenger from the mainland—1st, to execute the arrestment *jurisdictionis fundandæ causa*; and 2d, to arrest on the dependence would be very great, and that the delay occasioned by doing so would be hazardous, in respect there was reason to believe that the debtors intended to uplift the funds immediately, and thereby defeat the pursuer's claim, or compel him to resort to a foreign jurisdiction. The Lord Ordinary, on the Bills, having reported to the Division, their Lordships to-day, in respect of the circumstances stated, granted warrant as craved.

R. N.—A. C. DOUGLAS IN CONJOINED PROCESSES OF MULTIPLEPOINDING AND EXONERATION, JAMES DOUGLAS' TRUSTEES v. GENERAL DOUGLAS, AND DECLARATOR GENERAL DOUGLAS' v. THEM.—June 20.

Trust—Election.

The question here is whether or not the claimant, General Monteath Douglas, his daughters and sister, or any of them, have, by exercising their rights under the settlements of Major Archibald Monteath Douglas, forfeited all right to take benefit under the settlements of James Monteath Douglas, in which he dealt with the residue of the estate of the said Major Douglas, on the footing that he had power to revoke or alter the disposal thereof, as contained in the Major's own settlements. Major Douglas predeceased his brother James, and left deeds and testamentary writings appointing James his sole trustee, and directing him to invest the residue of his estates in land, to be entailed on James and his issue, failing whom, certain other persons. One of the Major's codicils is in these terms:—‘I am aware how very incorrect all these writings are, and I

hereby empower my brother to alter any part of them he may deem proper.' The Major having died in 1842, James made up titles to his whole estate as executor and heir-at-law, and intromitted with it as his own during his life. At death, James disposed of it by a deed, in which he directed his trustees to invest the residue of his whole estate (including the Major's estate) in land to be entailed on precisely the same heirs (with one exception) as the Major had directed his estate to be entailed upon. James died in 1850, and his trustees entered upon the management of the estate under the trust-deed. In 1853, General Monteath Douglas raised a declarator, concluding *inter alia*, that it was *ultra vires* of James to revoke or alter the Major's disposal of his estate; and the Court, in 1859, found, in terms of the declarator, that the trust created by the Major came into operation at his death, and that James had no power to revoke or alter the disposal of the estate made by the Major's settlement. Mr A. C. Douglas, who is the person entitled, under James' settlement, to succeed next after General Douglas and the other pursuers of the declarator, now contends that they, having defeated the settlement of James, and elected to take under the settlement of the Major, have forfeited all right to take any benefit under James' settlement, on the principle of approbate and reprobate.

The Lord Ordinary (Jerviswoode) found that General Monteath Douglas and the other pursuers of the declarator had not, by exercising the rights competent to them under the Major's settlement, forfeited their right to take benefit under James' settlement.

The other Judges concurred.

The Court adhered, holding that the circumstances of the case did not raise a question of approbate and reprobate, or put the General and others to their election, and that their conduct could not be regarded as an act of reprobation of James' settlement, or have the effect of depriving them of benefit under it.

OUTER HOUSE.

(Before Lord Ormidale.)

Pet.—GARDNER, FOR RECALL OF SEQUESTRATION.—June 6.

This was a petition for recall of a sequestration at the instance of the alleged bankrupt himself, upon the ground chiefly that there was *no estate* to sequester. The original petition for sequestration was at the instance of the landlord of the party applying for recall, against whom an action of damages was going on in the Court of Session, at the instance of the alleged bankrupt, and the present petition for recall was opposed by the landlord and the trustee in the sequestration. As the case is one of some importance, the interlocutor of the Lord Ordinary, as well as the note explaining the grounds of his Lordship's judgment, are given below at length.

Edinburgh, June 4, 1862.—The Lord Ordinary having heard counsel for the parties and considered the record, debate, and whole proceedings, recalls the sequestration of the estates of the petitioner James Gardner; appoints the recall to be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions, in terms of section 31 of the

‘ Bankruptcy (Scotland) Act, 1856 :’ Finds the petitioner entitled to expenses, allows an account thereof to be lodged, and remits the same to the auditor to tax and report.

(Signed) **R. MACFARLANE.**

Note.—In this case, the petitioner prays for recall of the sequestration which was awarded of his alleged estates on 7th February last, at the instance of Mr Walker, the landlord of flax and grain mills situated near Airdrie, of which the petitioner is tenant.

Mr Walker, the landlord, as also the trustee in the sequestration, have appeared and opposed the recall. They are the respondents in the petition.

It is not said that the sequestration was wrongously awarded in respect of any technical or statutory defect or informality. There is no dispute that Mr Walker, by whom the sequestration was applied for, was a creditor to the extent required by law, or that the present petitioner was a notour bankrupt.

The ground on which the application for a recall of the sequestration is rested is, that it was resorted to by Mr Walker in bad faith, and for no other purpose than preventing the petitioner from prosecuting an action of damages against him then, as still, depending in this Court. The motives of Mr Walker in applying for sequestration might probably be of little consequence if the proceedings were in themselves unassailable. But it now appears plainly enough that at the time when the sequestration was applied for and awarded the petitioner had not any estate whatever to come under the operation of a sequestration, and the respondents, when pressed on the point by the Lord Ordinary during the discussion, acknowledged that they knew of no means or estate of any kind, or to any extent, belonging to the petitioner which either has been or could be sequestrated. Accordingly, it appears from the Sederunt Book that the trustee in the sequestration made a report to the creditors, dated 15th March last, in which he refers to certain litigations in which the petitioner is involved, and to a state of affairs consisting wholly of claims of creditors, but in which there is no allusion to any assets or estate. On the contrary, the trustee reports that he ‘sent out a party to Brownsyde to ascertain if the bankrupt had any assets, when he was informed that the landlord had sold off the whole stock and household furniture.’ This, although not expressly admitted in the record, was not denied to be correct in the discussion before the Lord Ordinary.

In regard to the litigations in which the petitioner is involved, and which are referred to in the report of the trustees, as well as in the record, the respondents cannot, it is thought, be heard to say that they are calculated to yield any estate which will fall under the sequestration. There is a process of interdict in the Sheriff Court, at the instance of the petitioner, against a person of the name of Donald, to prevent him wrongously interfering with the water or stream which drives the mills; but an interdict process can yield in itself no funds or estate. There is also an action of damages, already adverted to as depending in this Court, at the petitioner’s instance, against his landlord, the respondent Walker. But in regard to this latter action, it is impossible for the respondent to plead that it may be the foundation of an available fund or estate to be recovered and administered under the sequestration; for, at the discussion

before the Lord Ordinary, they were unmeasured in their denunciation of that action as being utterly preposterous and groundless. In the record, also (Ans. 2), they refer to it as 'altogether groundless;' and, again (Ans. 11), they expressly deny that the petitioner 'has any well-founded claim against either the respondent Mr Walker, or Mr Donald, under his action of declarator and damages here mentioned.'

The result, then, clearly is, that neither at the date of the sequestration nor yet was there or is there any indication or trace of any means or estate belonging to the petitioner to be administered under a sequestration.

The object of the Bankrupt Act is the sequestration of estates, not the punishment of persons. Section XIII. of the Act 1856, on which the respondents seemed very much to rely, expressly bears that 'sequestration may be awarded *of the estates* of any person in the following cases.' That there is an estate to be sequestrated and administered under the statute is assumed not only in this clause, but throughout the whole Act; and the petition for the sequestration, in the present instance, and all the judicial acts and proceedings which followed, proceeded on the same assumption. The petition expressly bears, 'That in order to realize the estate of the said James Gardner, for behoof of the creditors, the petitioner is under the necessity of applying to your Lordships for sequestration of his, the said James Gardner's, estates, in terms of the Bankruptcy (Scotland) Act 1856, and Acts explaining or amending the same.' The prayer of the petition, as well as the deliverance thereon, and the statutory advertisements, are all to the same effect.

Having regard, then, to the object of the Bankruptcy Acts, to the terms of the statutory provisions, and to the circumstances of this case, the Lord Ordinary is not prepared to hold that the present sequestration, applied for and obtained by the respondent Walker in the perfect knowledge that the debtor had no estate whatever, is unchallengable, and cannot now be recalled. On the contrary, he is of opinion that the sequestration was not applied for, and is not sought to be maintained for any legitimate purpose, but in order to aid the respondent Walker in resisting a personal action of damages. If the respondent Walker had, in his petition for the sequestration, stated that there was no estate to sequester, and that the debtor had nothing of the nature of an asset, but merely a worthless claim of damages against himself, it cannot be supposed that upon such a medium sequestration would have been awarded; and if so, the Lord Ordinary does not see why the sequestration which was awarded on a representation of a state of things which, although necessary to make the application relevant and competent, had, in the applicant's perfect knowledge at the time, no foundation in truth, should not now be recalled. The Lord Ordinary considers he is entitled and called upon to prevent the Bankrupt Act being perverted from its proper object, and made the engine of oppression and injustice, *Speid and Husband v. Stirton*, June 10, 1850, 12 D. 985.

It appears from documents produced, and was not disputed at the debate, that a large majority of the petitioner's creditors, both in number and in value, concurred with him in desiring that the sequestration should be recalled.

(Initd.) R. M.

English Cases.

DAMAGES.—Declaration that defendants wrongfully raised, made, and continued an embankment of earth near plaintiff's dwelling-house, by reason whereof large quantities of water flowed down to the house, rendering it damp and less fit for habitation. Plea, that the embankment was raised and continued by defendants under the powers of certain Acts of Parliament. Replication, that although the embankment was raised and continued under the Acts, yet it is no bar, because the flowing of the water down to plaintiff's house was occasioned by the wrongful construction, negligent and improper raising and making of the embankment, and the want of proper and sufficient drains to the same, and continuing it so wrongfully constructed and insufficiently drained, by reason whereof, after the completion of the embankment, the flowing of the water against plaintiff's house took place. It was held the replication was good, and no departure, by Crompton, J., and Mellor, J.; Cockburn, C. J., dissenting. Crompton, J.: The plaintiff was not called upon to anticipate the defence by showing that the works were not justified by reason of Acts of Parliament which might never be set up. Such mode of pleading would probably be improper, and the matter alleged would probably have no effect on the subsequent pleadings, and be treated as merely idle; as in the case where a plaintiff alleges in his declaration that a defendant, from whom he expects a plea of infancy, was of full age when he executed the instrument declared on. Such pleading is what has been called leaping before you come to the hedge.—(*Brine v. Great Western Railway Co.*, 31 L. J., Q. B. 101.)

COUNSEL—Company.—A counsel cannot be heard to argue his own case with another; he must either appear in person or by counsel. If an incorporated company acting by an agent induces a person to enter into a contract for the benefit of the company, that company can no more repudiate their fraudulent agent than an individual can repudiate his; consequently the company are bound by the misrepresentation of their agent. The Lord Chancellor: Whenever an application was made to a court of equity to set aside a conveyance that had been made, the jurisdiction of the court of equity for the purpose must be founded on something amounting to fraud; and if the ground alleged was misrepresentation, either by the statement of what was false, or by the suppression of something that ought to have been disclosed, and so producing a false impression and conclusion, the case so alleged must be shown, according to the language of Lord Eldon, to amount to that which a court of equity holds to be fraud. But it was most essential in the administration of justice in a court of equity, that the nature of the case, when it was constituted of fraud, should be most accurately and fully stated in the bill of the plaintiff.—(*New Brunswick and Canada Rail. and Land Co. v. Conybeare* (House of Lords), 31 L. J., Ch. 297.)

SHAREHOLDER.—A person may be a shareholder of a company within the meaning of section 27 of 8 & 9 Vict., c. 16, without there being a register of shareholders duly authenticated by the seal of the company, provided he is entered in a book analogous to a register, as the holder of shares numbered and specifically appropriated to him. Wightman, J.: It may be that the sealing of the register may be requisite in certain cases to make it evidence; but it is not necessary that it should be sealed in order to make the defendant a shareholder.—(*Wolverhampton New Waterworks Co. v. Hawkesford* (Ex. Ch.), 31 L. J., C. P. 184.)

CONSTRUCTIVE TRUST.—Although debentures issued by a joint-stock company to a director in payment for work contracted to be done by him for the com-

pany are invalid in his hands, under 7 & 8 Vict., c. 110, s. 29, their invalidity will not affect a *bonâ fide* assignee for valuable consideration without notice, if the company have encouraged him in the belief that they were valid. Wood, V. C. : The 29th section of the Joint-Stock Companies Registration Act, 7 & 8 Vict., c. 110, expressly says, that all contracts of a joint-stock company with a direct or shall be void unless certain formalities are complied with, and I have already held that an honorary director, such as Mr Stears is said to have been, is in the same position as an ordinary director. But Mr Hulett, to whom the debentures were assigned, had no knowledge that Stears was a director at all. His name was not returned as such ; and I think, looking to that fact, and the fact of the contract being entered into with the company, Hulett is entitled to say he was not a director at all. There is a question, on the construction of the deed of settlement, whether debentures could be given only for loans ; but I think this not very important, for I think they could be given for a debt due on contract ; but whether they were given for loans or for work done, as regards Stears himself, they would be equally invalid.—(*Re the South Essex Gaslight and Coke Company, Hulett's case*, 31 L. J., Ch. 293.)

WILL.—A. and B., sisters living together, by a testamentary paper duly executed by both, directed that upon the death of either whatever remained of their joint savings should go to the survivor, and that at the death of the survivor whatever remained, as also their furniture, plate, etc., should be divided amongst certain specified persons. Upon the death of B., who survived A., the Court granted administration with this paper annexed as the will of B.—(*In the goods of Lovegrove*, 31 L. J., Pr. 87.)

INSURANCE ON LIFE.—A life policy was headed 'The Annual premium L.33. Whole term, payable by quarterly instalments of L.8, 5s. each.' The policy was dated the 2d of August 1856, and recited a payment up to the 2d of November of that year, and declared that if the life insured should die 'before the expiration of twelve calendar months from the date hereof,' and the assured should, 'on or before that period, or on or before the expiration of every succeeding twelve calendar months, pay the annual amount of premium,' the insurance office should be liable. If the life should die 'before the whole of the quarterly payments' were payable, the directors might deduct from the sum insured what would be 'sufficient to satisfy the whole of the said premiums for that year.' If the life died before 'having been assured fifteen months and made two annual payments,' the policy was to be void. The life died within twelve months after the third quarterly payment became due, but before it was paid. It was held by the House of Lords, the policy must be construed to have become void on non-payment of any quarterly premium, the payment of all the quarterly instalments being a condition precedent to the continuance of the policy for the current year.—(*The Official Manager of the Phoenix Life Assurance Co. v. Sheridan*, 31 L. J., Q. B. 91.)

BILLS AND NOTES.—An action may be brought by the holder of a banker's cheque payable to the bearer against the drawer, by the holder and indorsee against the maker and indorser of a promissory note, and by the holder against the acceptor of a bill of exchange, in the name of a third person who has no interest in any of these securities, and who has given no authority for the use of his name, and who is ignorant, at the time of his name being so used, of its use for that purpose,—if the holder indorse the promissory note and bill of exchange with the name of such third person ; and, if such third person after action brought adopt and ratify the proceedings taken in his name, the defendant in such action cannot dispute his liability on the ground that the plaintiff was not the bearer of the cheque, the indorsee or lawful holder of the note, or the owner or lawful holder of the bill. Wilde, B. : In the judgment in the case of *Wilson v. Tumman*, to which I have already referred, the law is very distinctly laid down at p. 242 in the report in 6 Man. and G., 'That an act done, *for another*, by a person not assuming to act for himself, but for such other person, though

without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the well-known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his *previous* authority.'—(*Ancona v. Marks*, 31 L. J., Ex. 163.)

WILL.—Testator on his deathbed gave instructions for a will to a person who was unknown to him, and who, in preparing the will, omitted the testator's surname, and also introduced the name and description of an executor who was totally unknown to the testator or any of his friends or relations, and who could not therefore be identified. With the consent of all the parties interested, the Court granted administration with the will annexed, to one of the residuary legatees, under the 73d section of the Probate Act, 1857.—(*In the goods of Sawtell (deceased)*, 31 L. J., Pr. 65.)

FRAUD.—A trader, when involved in difficulties and hopelessly insolvent, deposited the title-deeds of property of which he was the surviving trustee with his brother, who was entitled to the same property for life under the will of which the bankrupt was such trustee, as security for a debt owing to the brother. One of the Commissioners held that this was a fraudulent preference, and refused any certificate, and withheld protection. On appeal, the decision was affirmed; but protection, under the circumstances of the case, was granted *valeat quantum*.—(*In re Barton*, 31 L. J., Bank. 7.)

MARINE INSURANCE.—R., the owner of a cargo of wheat shipped at Odessa for England, valued at L.7000, effected two policies, one for L.4000, and the other for L.3000. The cargo fell in value, and was agreed, on the 8th of March, to be sold to an agent of B. for L.5358 by a contract for sale of cargo, including all shipping documents, freight and insurance, and the documents were accordingly delivered; and B., on the 13th, gave an order for the amount, which was paid on the following day. R. indorsed on the policy for L.3000, 'We transfer this policy to Messrs — to the extent of L.1700,' and the same was delivered to the agent of B. The ship and cargo were totally lost on the 16th of the same month. The insurance company paid L.1300, the remainder of the L.3000, into Court; and Vice-Chancellor Wood decided that the same belonged to R., for that B., under his contract, was not entitled to an assignment of all existing policies effected on the cargo, but merely to have the cargo sufficiently insured; and that a provision in his contract, that the price was to be paid in exchange for bills of lading and policies of insurance, did not alter the case. From this decision B. appealed; and it was held, reversing that decision, that R. was not so entitled, but that the whole L.3000 secured by the policy belonged to B., the wheat having been sold as insured at the price set upon it by the vendors in the policies, and not at the price to which it had afterwards fallen. Vice-Chancellor Wood had ordered a fund in Court to be paid to R.; and upon the reversal of that decree, R. moved that that part of the decree of the Appeal Court which ordered the fund in Court to be paid to B. should be suspended pending the appeal of R. to the House of Lords; but the Lords Justices declined, B. not objecting to give security to abide by any order of the House of Lords on the hearing of the appeal.—(*Ralli v. the Universal Marine Insurance Co.*, 31 L. J., Ch. 313.)

FRAUD.—A solicitor was co-trustee under a settlement of a sum of L.3000 charged upon certain property. He borrowed a sum of L.300, and, as security, deposited the title-deeds of the above-named property, without the knowledge of his co-trustee, and without informing the lender of the fact of the L.3000 charge. The solicitor was adjudged bankrupt, and one of the Commissioners refused him any certificate, on the ground that the above was a fraud both on the *cestuis que trust* and on the lender of the L.300. On appeal, the Lords Justices, considering that wilful fraud could not necessarily be implied from the facts of the case, mitigated the sentence by the grant of a certificate of the

second class, after a suspension of two years from the date of the adjudication, and said that their invariable rule was never to alter an order of a Commissioner refusing a certificate, where fraud was established.—(*In re Freston*, 31 L. J., Bank. 1.)

MASTER AND SERVANT.—In order to give Justices jurisdiction to hear a complaint as to the non-payment of wages, under 20 Geo. II., c. 19, sec. 1, it is only necessary that the relation of master and servant should exist between the parties, and the contract of service need not be for any specific time.—(*Taylor v. Carr*, 31 L. J., M. Ca. 111.)

FACTOR.—Defendants, bankers, having at the request of J. L. made advances to S. L., and having a lien on certain goods in their possession in respect thereof, it was agreed between the bankers and J. L., that in consideration of the delivery of those goods to J. L., the latter should deliver to the bankers certain other goods intrusted to J. L. by plaintiff, his principal, to be held as a lien by defendants in place of the other goods, and also in respect of any future advances to be made to J. L., and which J. L. then requested the bankers to make, and which agreement was carried out, and further advances made to J. L. in pursuance of such request. It was held, that the bankers having no notice of plaintiff's title, the transaction was protected by the Factors Act, 5 & 6 Vict., c. 39. To a plea setting up the above facts to an action of detinue by the owner against the bankers, plaintiff replied—First, that he was induced to intrust J. L. with the possession of the goods by the fraud of J. L.; secondly, that the agreement by J. L. to deliver the goods by way of pledge was not made, nor were the goods delivered to the defendants in the usual and ordinary course of business; thirdly, that the goods first deposited with defendants were not J. L.'s goods, nor had the defendants any lien thereon from J. L. It was held, the facts disclosed by the plea constituted an answer to the action under the Factors Act, and that neither replication avoided the plea.—(*Sheppard v. the Union Bank of London*, 31 L. J., Ex. 154.)

RATE.—By a local Act the council of L. were empowered to make a rate for the purpose of defraying the expenses of a library and museum established under the Act, and it was provided the amount to be levied should 'not in any one year exceed 1d. in the pound upon the rateable value of the property within the borough liable to such rate.' It was held, the amount must not exceed 1d. in the pound upon the rateable value of the property within the borough actually capable of producing and yielding the amount. Cockburn, C. J.: Upon the words of the statute, it is plain that the intention was, that the occupier of each house should be assessable at a rate not exceeding 1d. in the pound upon the rateable value of his house; and it is not because some houses are unfruitful in consequence of being unoccupied, or something of that sort, that he can be called upon to pay at a higher rate than 1d. in the pound.—(*In re the Corporation of Liverpool*, 31 L. J., M. Ca. 108.)

WILL.—By a will, made subsequently to the Wills Act, 1 Vict. c. 26, testator, after directing his debts and funeral and testamentary expenses to be paid by his executors as soon as conveniently might be after his decease, devised to the persons whom he afterwards appointed executors certain freehold premises, in trust to pay the rents and proceeds thereof unto the testator's son, J. S., for his natural life, but without power of anticipation, and from and after the death of J. S. in trust for the right heirs of him the said J. S. for ever. It was held, the executors took the legal estate in fee in the said freehold premises, and therefore, as both the estate to J. S. for life and also the estate to the heirs of J. S. were equitable, the rule in *Shelley's case* applied, and J. S. had an equitable estate in fee.—(*Spence v. Spence*, 31 L. J., C. P. 189.)

THE
JOURNAL OF JURISPRUDENCE.

THE CARDROSS CASE.

SOME things attain a magnitude and importance which they do not deserve. This case, for example, has acquired a celebrity to which it was not entitled, whether we consider it in its origin or its results. It has now come to a conclusion, unless there is an appeal taken against the judgment to the House of Lords; or unless the pursuer, the Rev. Mr M'Millan, profiting by the views of the majority of the judges in pronouncing an adverse decision—but without disturbing it—proceed to raise a new action, calling the proper parties into the field. If he does move further in his unfortunate career, it is likely he will adopt the latter course. In the meantime, we cannot help expressing our opinion, in which the profession and the public at large will concur, that nothing could be more unfortunate than the erratic nature of the procedure the case was allowed to take, and that nothing could be less satisfactory than the result arrived at by the Court. There was one great principle involved in the cause, and that was disposed of long ago. We refer to the principle which was established when the preliminary pleas were repelled, that the Civil Court can competently interfere and set aside a sentence of an Ecclesiastical Court—though it be of a voluntary association of Christians—if it can be shown that the sentence was pronounced irregularly and in violation of the rules or constitution of the Church, and provided also the civil interests of the pursuer have been affected. It was against that view of the law that the defenders in this case contended with so much tenacity; but, since then, they have confined their arguments to a much safer point, viz., that as spiritual privileges confer no civil right, the de-

privation of them cannot affect civil rights or interests. If they had satisfied production at first, and admitted the jurisdiction to *inquire*, as had been done by other voluntary bodies of Dissenters, we venture to say this litigation would have been terminated before it had well been in Court. But, instead of that, they put on record certain pleas which had better not have been stated; and, in the words of Lord Curriehill, 'after years have been wasted in discussing and disposing of these pleas, the parties have at last met each other fairly on the merits of the pursuer's claims of damages.'

Four years of fruitless litigation,—and what is the result? Anomalous as it must appear, the pursuer has, like Don Quixote, been fighting with some unreal or windmill antagonist; and so he has been informed by the learned judges, that no proper defenders were ever in Court to join issue with him. At the same time, nothing new has been decided. Everybody knew that the Free Church was not a corporation, and therefore could not be called into Court like a corporation. Every voluntary body of Christians must be called into Court like any other voluntary association, whether for the promotion of the Fine Arts or for mutual assurance among the members. Now, the first action at M'Millan's instance was directed against the General Assembly of the Free Church of 1858, and certain of its office-bearers,—namely, the Moderator and Clerks, as representing that Assembly; and the second action was against the same parties, with the addition of three members of the Assembly, as individuals. We need not repeat the different stages through which the case went: its progress was slow, owing chiefly to the pleas stated by the defenders, which had the effect of obstructing procedure. No objection was taken to the instance against them. They pleaded as if they had been properly called, and had a *locus standi* in Court. But, at a very early stage of the cause, Lord Ivory expressed doubts whether the defenders appeared under any *nomen juris* which the Court could recognise.

The pursuer was thus warned of a serious difficulty in the way of his obtaining judgment against the defenders called; and, on the other hand, it was suggested to the defenders that they might avail themselves, if they chose, of a plea which would have the effect of throwing both actions out of Court. Lord Deas at the same time suggested a mode of obviating the difficulty if they (the defenders) did not wish to avail themselves of the plea; and that was to give in a minute, explaining more specifically who were the parties for whom the preliminary pleas were maintained. When the nature of

the action is considered, the objection suggested by Lord Ivory becomes more formidable than a mere technicality. The summons concluded for reduction of a spiritual sentence, or at least a sentence pronounced by a voluntary Church Court, in the exercise of discipline on one of its members. If the reduction had stood by itself, it would have been incompetent, because it would virtually be seeking to review in a Civil Court an ecclesiastical sentence; hence there were also petitory conclusions for damages. Indeed, the reductive conclusions would have been unnecessary, except to clear the way to award damages on account of a civil wrong. If, then, the redress sought was for damages, it became clear that the parties who were liable in these were not in Court. They were the members of the Assembly who were present in 1858, and who committed the wrong against the pursuer. When the objection was mooted, Lord Deas made some remarks strongly supporting this view of the matter. He referred to the well-known case of *Earl Kinnoul and the Rev. David Young v. The Presbytery of Auchterarder* (1 Bell's App., p. 662), where the parties who were called were the whole members composing the majority of the Presbytery who voted for the resolution complained of; and the House of Lords held that they were the proper defenders. His Lordship appears to have then foreseen in a strong light the difficulty the Court had latterly to contend with. It was this, that while the defenders, the Free Church Assembly of 1858, were willing to appear and oppose the action, they denied that they could be made liable in damages. How were they to be recovered? Or, to put it in Lord Deas' own words, 'The position the defenders assume is, that while they have a standing *in judicio* to obtain absolvitor on the merits on behalf of those interested, they claim at same time the privilege of dissolving into shadow, if by any chance the judgment is to be against them.'

If it was *pars judicis* to state this objection, it should then have been considered. If it was *pars judicis* to sustain this objection in spite of the wishes of both parties, it seems trifling with them to allow them to proceed further in the cause. There can be no doubt that Lord Ivory was right in stating the objection to the defender's instance. In *Bell v. Williamson's Trustees*, 8 July 1822 (1 Shaw, App. 220), the House of Lords held, that it was *pars judicis* to see that all parties appearing to be interested were called, and remitted the case back to the Court of Session accordingly. That was a case arising out of a partnership; but it fixed the duty of the Court.

And the Court of Session acted on it in the subsequent case of *Bennet and M'Farlane v. Burgess*, 27 May 1828 (6 S. and D., p. 854). But here both parties consented. While the pursuer was willing to take the decree of the Court for what it was worth against the parties he had called, they were not only willing to abide judgment, but repudiated all intention of pleading the objection, that all parties had not been called. But then, it is a fundamental principle of jurisprudence, that a Court should not pronounce a decree unless they can enforce it; and how was a decree against the 'General Assembly of the Free Church of 1858 to be enforced?'

In a matter of such importance to the regularity of judicial procedure, it is to be regretted that the action was not dismissed *in limine*. The Court, however, having discharged its duty to the parties who continued to plead the case to an issue, we think the view adopted by Lord Deas, in delivering his opinion, at advising on the matter of issues or no issues, the more consistent. He said, 'I confess I am not anxious to thrust upon parties the benefit of pleas which they disclaim. And although it may be *pars judicis* to take up such an objection when the ends of justice seem to require it, it does not follow that the same course is to be taken where the parties who alone have an interest to plead the objection, deliberately waive, and expressly repudiate it. In no view could we go further, in such circumstances, than to require the pursuer still to call any other parties interested. To dismiss the actions *simpliciter*, would be a course wholly unexampled.' After what had occurred, we take leave to say, the suggestion here made would have met the justice of the case better than the course followed by the other judges, the Lord President and Lord Curriehill, who dismissed the action *simpliciter*. In regard to the law, as laid down by them, as to how the Courts of a voluntary association of Christians ought to be convened in a Civil Court, we have nothing to say. If there was any room for dubiety or uncertainty before, there can be none now. The Lord President stated the law in his own lucid style. After referring to the mode in which the defenders were called in the second action, he said, 'I am of opinion that it is not competent so to convene that body or aggregate of persons in an action of damages. They are not a corporation; they are not a joint stock company, that are to be sued by their office-bearers. They are a certain selected number of the members of a voluntary association,—members chosen and assembled according to the rules of the association,

to transact a certain part of its business, and then to be dissolved. It was said they met as a Court, and in their collective and *quasi-judicial* character did the wrong complained of; but it does not from thence follow, that in their collective capacity they can be convened in an action, and subjected in damages. There is nothing on the record to show who were the individuals composing the body, or composing the alleged majority in the division which is said to have taken place. There is nothing to show who were the doers of the wrong complained of.¹

The view here stated by the Lord President is so obvious and conclusive, that we cannot help wondering that it had not suggested itself either to the parties or to the Court at the very outset of the litigation. The real party liable to Mr M'Millan, if there exist liability at all, must be the Free Church—that is, the association calling itself so—and not the General Assembly of 1858. That Assembly existed only during that year, and its acts were binding on the *Free Church*. Yet, while it did exist, properly speaking it did not bind itself, as it was only the organ of the body or association. Hence arises any difficulty there may be in suing or being sued on the part of that Church. It is alleged in this case, that the constitution and government of the Free Church is the same, or as near as may be, to that of the Established Church of Scotland. If so, then we should have an easy solution of the difficulty, because we should agree with Lord Deas, that it was part of the contract or constitution of the Church that the Assembly, or Synod, or Presbytery, should be called in Court in the same way as in the Established Church, where these are regarded as corporate bodies. They may be cited in the descriptive name, it having been decided in a well-known case, that they are a corporation (*Minister and Kirk-Session of Dalry*, Nov. 17, 1791). But, in one sense, the Free Assembly of 1858 was only a public meeting of certain Christians holding particular views; and as soon as the meeting dissolved, or even while it was yet assembled, it could not have been cited in the Civil Court to make reparation on account of any of its resolutions. In another view, the Assembly of 1858 stood to the Free Church in much the same way as an agent does to his principal; and it could only be made liable in that limited class of cases where an agent binds not only his principal, but himself. The way in which the defenders are called, however, was not the only ground on which the majority of the Court rested

their decision. We shall only advert for a moment to the other ground;—it was, that the pursuer had not put the element of malice into his issues.

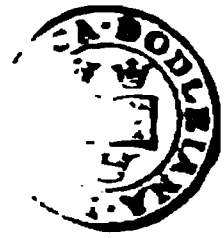
The opinion delivered by Lord Curriehill was a very able exposition of the law on the responsibility of voluntary Church Courts in exercising the functions conferred on them by the Association, and as to what the pursuer requires to make out in appealing to the Civil Court for redress against an ecclesiastical sentence. Mr M'Millan had malice in his summons, but sought to withdraw it from the issues. This he could not do. The immunity from liability for errors of an arbitrator, is as extensive as that of any civil judge in the country ; and in like manner an Ecclesiastical Court of a voluntary Church, being just a Court of arbitration for the members, has almost an equal degree of immunity. It follows, that when an action is brought in the Civil Court for damages on account of some act of such a tribunal, its members are privileged. The attempt made in this case to get quit of privilege, must have been because the act complained of was not a *bona fide* exercise of the functions conferred on the Court ; in short, that it was lawless. But we are persuaded the Civil Court would not forego a principle of so great importance in our law as that, on mere wild assertion. It is very easy to say on record that something that was done was *ultra vires* of the Court ; but when one comes to analyze the particulars of the statement or allegation, it will be found that it is simply an error in judgment after all. Church Courts are naturally very jealous of the interference of the Civil Courts with their sentences, which are generally affecting spiritual matters. The Free Church does not stand alone in this respect. It was only lately that Lord Jerviswoode repelled a plea stated on behalf of the Established Church, against satisfying production in a case now pending before him at the instance of the Rev. Dr Lang of Sydney. The plea there was, that the sentence complained of (which deposed Dr Lang) being an ecclesiastical sentence, pronounced in a proper ecclesiastical cause, could not be reviewed by the Civil Court. But while the Civil Court may, and sometimes *will* interfere, we are sure *it* is as jealous and as unwilling to exercise its powers in that respect as the Church Courts themselves can possibly be. When parties aggrieved do come before them for redress, they must undertake to prove malice on the part of the Church functionaries. Were it not so, discipline and ecclesiastical government in a voluntary Church would become impracticable.

ANCIENT LAW.

Ancient Law : its Connection with the Early History of Society, and its Relation to Modern Ideas. By HENRY SUMNER MAINE, Reader on Jurisprudence and the Civil Law at the Middle Temple, and formerly Regius Professor of the Civil Law in the University of Cambridge. London : John Murray. 1861.

As the parliamentary session draws to a close, our readers will naturally seek in the editorial department of the Journal for the usual review of the law bills of the session. All that could be written on that subject might be conveyed in the form of a paraphrase of a well-known chapter from an unknown work on the natural history of a northern island. In short, there are *no law bills* this session. With the exception, perhaps, of measures regarding police, by the provisions of which, it is understood that any person who chooses to consider any other person, animal, or thing, 'a nuisance,' may forthwith, without any form of law, have such nuisance abated, suppressed, or annihilated—the statute-book of 1862 contains no enactment affecting Scotland of the least importance. The ensuing vacation in the Supreme Courts will therefore make comparatively light the work belonging to the primary design of this journal—namely, that of reviewing the practical working and progress of the laws of the present time; and enable us, without trespassing on the space allotted to more practical matters, to invite the attention of our readers to the subject discussed in the treatise of which the title is prefixed,—a work which, from its importance in the philosophical and legal literature of the sister country, deserves a more detailed notice than we were able on a former occasion to give it; and which, as we infer, has contributed to secure for its author the substantial and honourable reward of an appointment to a seat in one of the governing councils in India.

Hitherto the field to which Mr Maine has devoted himself, has been the study of the Roman law in its bearing upon the law of England; a field which, until taken up by him, was entirely unoccupied. In almost all other civilised countries, there is a recognised, though not always correctly understood, historical connection between the civil law of Rome and the modern legal system. In England, until traced by Mr Maine, that connection had been not



only unrecognised, but disowned. Yet Mr Maine has succeeded in showing most incontestably that the somewhat inelegant but most useful fabric of English law, even that part of it which appears most modern, rests, equally with the other legal systems of Europe, and whether wittingly or not, upon the basis of the structure raised by that iron nation, which has left its impress on the whole organization of modern society. Though occupying hitherto that field of inquiry in England almost exclusively, Mr Maine, no doubt, owes much to the German writers by whom a similar field in their own country had been already most thoroughly worked; especially to Savigny, whose investigations into the archaic shapes of legal ideas are of equal interest for all civilised nations.

Distinguished at his university as a most able and accomplished scholar, Mr Maine entered upon the work above indicated in full possession of the only key to a discriminating comprehension of the Roman law, which was the first requisite for its performance. The work was pursued with the ardour of a leader in an original research; and the interest which his first lectures in London awakened among law students, will not be forgotten by the more cultivated portion of the young English bar. It was not, however, till last year that any considerable work of Mr Maine's appeared before the public; although an able essay on Roman law and legal education, published in the Cambridge Essays of 1856, had made his name known beyond the immediate audience of his lectures.

The scope of Mr Maine's work upon 'Ancient Law,' is somewhat more comprehensive than that which we have already indicated as the main subject of his lectures. It aims at a philosophic investigation of the growth of legal ideas known to the civilised world. Such investigations, where previously attempted, have been very loosely pursued, at least in England. It seems as if legal writers, tied down by practice and precedent, when treating of the institutes of the law, have thought themselves entitled the more to indulge in fancy when they came to speculate on its origin and history. Mr Maine, on the other hand, confines himself to a strict method of induction, gathering his materials partly from tradition and ancient poetry, partly from the customs and laws of nations with whom we can trace a common origin, but whose institutions have received a separate development; but chiefly from the remains of the great structure of the Roman law, which contain far the richest material, and with which the author, as we have already said, is most familiar. In

apology for the want of philosophical treatment of this subject by previous writers, it must be said that it is only within the last half century that some of the best materials for such inquiries have been accessible. The discovery of the Institutes of Gaius, made in 1816 by Niebuhr in the cathedral library at Verona, in a manuscript written over with the letters of St Jerome, has nearly doubled our knowledge of the archaic forms of the Roman law. The researches of Sanskrit philologists within the present century, have established an identity of origin between the races of western Europe and of India; and this knowledge again, combined with recent observation of Hindoo customs and study of their literature, has opened up a new and valuable source for forming an estimate of the growth of ideas which precedes the development of western civilisation.

In our former article,¹ we dwelt in some detail upon the general method pursued by Mr Maine, and upon the several processes by which, as he shows, the general development of law has been effected at different periods of its growth. We shall, in the present article, confine ourselves to two great branches of the subject, namely, the legal history of personal status, and the history of property and contract law.

In a chapter upon 'The History of the Law of Nature,' Mr Maine traces with great ingenuity the varied ramifications into which the speculations of the later Roman jurists upon the 'law of nature' have been developed in modern times. Their fruits he finds in the law of occupation laid down by Grotius, in the 'Social Compact' of Locke, and in the 'Etat de Nature' of Rousseau; and he recognises their offspring in the vast claims of dominion raised by Spain upon the good fortune of a few navigators, and in the terms of the celebrated Declaration of Independence of the American States. Very different to the speculations upon the law of nature which have been so widely accepted, is the picture of primitive society presented by the reliable materials already alluded to, and which Mr Maine has collected and arranged in a chapter which is perhaps the most able and interesting in his book.

'The rudiments of the social state, so far as they are known to us at all, are known through testimony of three sorts—accounts by cotemporary observers of civilisations less advanced than their own, the records which particular races have preserved concerning their primitive history, and ancient law.' The first kind of evidence is the best we could have expected; the best example of it is the

¹ September 1861.

'Germany' of Tacitus; but the amount of this sort of testimony which we possess is exceedingly small.

'The lofty contempt which a civilised people entertains for barbarous neighbours, has caused a remarkable negligence in observing them; and this carelessness has been aggravated at times by fear, by religious prejudice, and even by the use of those very terms, civilisation and barbarism, which convey to most persons the impression of a difference not merely in degree, but in kind. Even the *Germany* has been suspected by some critics of sacrificing fidelity to poignancy of contrast and picturesqueness of narrative. Other histories, too, which have been handed down to us among the archives of the people to whose infancy they relate, have been thought distorted by the pride of race or by the religious sentiment of a newer age.' 'But such suspicions,' Mr Maine observes, 'do not apply to a great deal of archaic law. It was preserved only because it was old. Those who practised and obeyed it did not understand it, and could give no account of it, except that it had come down to them from their ancestors. If we confine our attention to those fragments of ancient institutions which we cannot reasonably suppose to have been tampered with, we are able to gain a clear conception of certain great characteristics of the society to which they originally belonged; and thus obtain a key aiding us at once to discriminate and to comprehend the traits obtainable from other sources of knowledge.

'The effect of the evidence derived from comparative jurisprudence, is to establish that view of the primeval condition of the human race which is known as the Patriarchal Theory. There is no doubt, of course, that this theory was originally based on the scriptural history of the Hebrew patriarchs in Lower Asia; but, as has been explained already, its connection with Scripture rather militated than otherwise against its reception as a complete theory, since the majority of the inquirers who till recently addressed themselves with most earnestness to the colligation of social phenomena, were either influenced by the strongest prejudice against Hebrew antiquities, or by the strongest desire to construct their system without the assistance of religious records. Even now there is perhaps a disposition to undervalue these accounts, or rather to decline generalizing from them, as forming part of the traditions of a Semitic people. It is to be noted, however, that the legal testimony comes nearly exclusively from the institutions of societies belonging to the Indo-European stock—the Romans, Hindoos, and Slavonians supplying the greater part of it; and, indeed, the difficulty, at the present stage of the inquiry, is to know where to stop, to say of what races of men it is *not* allowable to lay down that the society in which they are united was originally organized on the patriarchal model. The chief lineaments of such a society, as collected from the early chapters in Genesis, I need not attempt to depict with any minuteness, both because they are familiar to most of us from our earliest childhood, and because, from the interest once attaching to the controversy which takes its name from the debate between Locke and Filmer, they fill a whole chapter, though not a very profitable one, in English literature. The points which lie on the surface of the history are these:—The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves; indeed, the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself. The flocks and herds of the children are the flocks and herds of the father; and the possessions of the parent, which he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree, the eldest son sometimes receiving a double share under the name of birthright, but more generally endowed with no hereditary advantage beyond an honorary precedence. A less obvious inference from scriptural accounts is, that they seem to plant us on the traces of the breach which is first effected in the empire of the parent. The families of Jacob and Esau separate, and form two nations; but the families of Jacob's children hold together, and

become a people. This looks like the immature germ of a state or commonwealth, and of an order of rights superior to the claims of family relation.¹

But when we go forward, and find family groups in some state of wider organization, what is the nature of this union, and the degree of intimacy which it involves?

'It is just here that archaic law renders us one of the greatest of its services, and fills up a gap which otherwise could only have been bridged by conjecture. It is full in all its provinces of the clearest indications that society in primitive times was not what it is assumed to be at present—a collection of *individuals*. In fact, and in the view of the men who composed it, it was an *aggregation of families*. The contrast may be most forcibly expressed by saying, that the *unit* of an ancient society was the family,—of a modern society, the *individual*.'

But is it possible from ancient law also to trace the *cause* of the political and social aggregation of families? It is here, too, that ancient law furnishes some of its most interesting hints.

'In most of the Greek states, and in Rome, there long remained the vestiges of an ascending series of groups out of which the state was at first constituted. The family, house, and tribe of the Romans may be taken as the type of them; and they are so described to us, that we can scarcely help conceiving them as a series of concentric circles which have gradually expanded from the same point. The elementary group is the family, connected by common subjection to the highest male ascendant. The aggregation of houses makes the tribe. The aggregation of tribes constitutes the commonwealth. Are we at liberty to follow these indications, and to lay down that the commonwealth is a collection of persons united by common descent from the progenitor of an original family? Of this we may at least be certain, that all ancient societies regarded themselves as having proceeded from one original stock, and even laboured under an incapacity for comprehending any reason except this for their holding together in political union. The history of political ideas begins, in fact, with the assumption that kinship in blood is the sole possible ground of community in political functions; nor is there any of those subversions of feeling, which we term *emphatically* revolutions, so startling and so complete as the change which is accomplished when some other principle—such as that, for instance, of *local contiguity*—establishes itself for the first time as the basis of common political action.'

At the same time we find constant traces of men of foreign origin being admitted to share the privileges of the state. This anomaly is explained by the important part which is played in early society by the 'Fiction of Adoption,' through which, no doubt, the assimilation of strangers into the community was effected:—

'The expedient which in those times commanded favour was, that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted; and it is precisely the good faith of this fiction, and the closeness with which it seemed to imitate reality, that we cannot now hope to understand. One circumstance, however, which it is important to recollect is, that the men who formed the various political groups were certainly in the habit of meeting together periodically, for the purpose of acknowledging and consecrating their association by common sacrifices. Strangers amalgamated with the brotherhood were doubtless admitted to these sacrifices; and when that was once done, we can easily believe that it seemed

¹ Maine's Ancient Law, p. 120.

equally easy, or not more difficult, to conceive them as sharing in the common lineage. The conclusion, then, which is suggested by the evidence is, not that all early societies were formed by descent from the same ancestor, but that all of them which had any permanence and solidity, either were so descended or assumed that they were. An indefinite number of causes may have shattered the primitive groups; but wherever their ingredients recombined, it was on the model or principle of an association of kindred. Whatever were the fact, all thought, language, and law adjusted themselves to the assumption. But though all this seems to me to be established with reference to the communities with whose records we are acquainted, the remainder of their history sustains the position before laid down as to the essentially transient and terminable influence of the most powerful legal fictions. At some point of time—probably as soon as they felt themselves strong enough to resist extrinsic pressure—all these states ceased to recruit themselves by factitious extensions of consanguinity. They necessarily, therefore, became Aristocracies, in all cases where a fresh population from any cause collected around them which could put in no claim to community of origin. Their sternness in maintaining the central principle of a system under which political rights were attainable under no terms whatever, except connection in blood, real or artificial, taught their inferiors another principle, which proved to be endowed with a far higher measure of vitality. This was the principle of *local contiguity*, now recognised everywhere as the condition of community in political functions. A new set of political ideas came at once into existence, which, being those of ourselves, our contemporaries, and, in a great measure, of our ancestors, rather obscure our perception of the older theory which they vanquished and dethroned.'

The most remarkable trace of the patriarchal system remaining in the legal system of an advanced society, is the *patria potestas* of the Roman law. The power of the head of the family over all descendants was, by the letter of the law in the early Republic, absolute over the person, extending to life and death, and even to the power of sale into bondage. Nay more, it would appear that when, on liberation from this service, which took place at the census (Gaius I. 138), he fell back under the *patria potestas*, the father could again sell him; and the earliest amelioration of this condition was, that on liberation after three sales the son became free. The legal forms by which even up to the time of the Empire a son was emancipated from the power of the father, are stamped with the impress of the original rigour of the law and its first amelioration. But though the power over the person became early restricted, that over the property remained absolute to a late date; and to the last the father had a *lifere*nt in all property of descendants not emancipated, which was not acquired in the public service. Such an institution, existing contemporaneously with a highly developed system of law, is one of the most singular phenomena in the history of jurisprudence, and is, perhaps, only to be explained by supposing that the rigour of the law was much modified by custom in the way of its administration. But had this institution stood alone, the proof

would be incomplete that it had its origin in the primitive society from which that legal system sprung. Other traits, however, are not wanting to show how intimately the *patria potestas* was bound up with the whole framework of the society among whom that institution was so tenaciously held. If we look at the whole theory of kinship as conceived by the civil law of the Romans, we find that it is entirely grounded upon the idea of a common *patria potestas*. The *Agnatio*, the only relationship known to that law, excludes many whom we consider as relations, confining itself to those who trace their connection exclusively through males. But, on the other hand, it includes many in whom, according to modern ideas, no kinship would be recognised. It includes all persons connected through males who have been brought into the family by adoption. The only explanation of this apparently arbitrary definition of kinship is found in the *patria potestas*. Descent through females is excluded, because the female and her descendants are included in the *patria potestas* of the family of her husband. The tie by adoption is included, because it unites persons under the same *patria potestas*. In the Roman law, indeed, we have the explicit recognition of this system and its relation to the *patria potestas*; but having gained from this system the key to the idea of Agnation, it is possible to find traces of it almost everywhere. There are few indigenous bodies of law belonging to communities of the Indo-European stock, which do not exhibit peculiarities, in the most ancient part of their structure, which are clearly referable to Agnation. It appears in Hindoo law. It pervades so much of the laws of the races which overran the Roman Empire, as appears to have really formed part of their primitive usage; and had it not been for the vast influence of the later equitable principles of that Roman law, by the analogy of whose earlier forms it is interpreted to us, the system would probably have perpetuated itself still more than it has done in the modern jurisprudence of Europe. We shall here quote from Mr Maine one of its most curious results:—

‘ In Agnation, too (pp. 151, 152), is to be sought the explanation of that extraordinary rule of English law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another’s lands. In the customs of Normandy, the rule applies to *uterine* brothers only, that is, to brothers by the same mother, but not by the same father; and limited in this way, it is a strict deduction from the system of Agnation, under which, uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clue to its principle, interpreted it as a general prohibition against the succession of the half-blood, and extended it to *consan-*

guineous brothers, that is, to sons of the same father by different wives. In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half-blood.'

In the history of the law of persons, there is perhaps no more interesting chapter than that which concerns the status of females. From the primitive constitution of the family above described, a woman could not become the head of a family; the maxim of Roman law, that she is the head as well as the end of her own family, being of comparatively recent invention.

'There is a peculiar contrivance of archaic jurisprudence,' says Mr Maine, 'for retaining her in the bondage of the family for life. This is the institution known to the oldest Roman law as the perpetual tutelage of women, under which a female, though relieved from her parent's authority by his decease, continues subject through life to her nearest male relations as her guardians. Perpetual guardianship is obviously neither more nor less than an artificial prolongation of the *patria potestas*, when for other purposes it has been dissolved. In India the system survives in absolute completeness, and its operation is so strict that a Hindoo mother frequently becomes the ward of her own sons.'

In Europe nearly all the invaders of the Western Empire had this institution among their indigenous usages; and the laws of the Scandinavian nations preserved it until quite recently. But its history in the Roman jurisprudence, as disclosed in the Institutes of Gaius, is most remarkable. In his time it seems to have been an institution retained for some conveyancing purposes, which the forms of the civil law rendered necessary, but practically made nugatory under the equitable jurisdiction of the prætor. But it appears that the *Blackstones* of an earlier time had invented a *reason* for the institution, namely, that women remained under guardianship *propter animi levitatem*, 'because of the lightness of their mind' (Gaius I. 144). The indignant protest which the great jurist of Antonine's age makes against an argument so devoid of gallantry, might, when translated, be almost mistaken for a passage in an essay of Mr Mill's. We shall here translate it:—

'But that women of complete age should be in tutelage, seems to have been advised by almost no reason of worth; for that which is commonly assigned—namely, because they are often deceived through the lightness of their mind, and it was right they should be controlled by the authority of tutors—seems more specious than true; for women who are of complete age, themselves manage their own affairs; and though in some cases the tutor, for the sake of form, interposes his authority, yet he is often obliged by the prætor to do so against his will.'

The forms of conveyancing requiring this authority of the tutor probably became obsolete with the abolition, effected by Justinian, of the distinction between *res Mancipi* and *res nec Mancipi*; and, at

all events, with the compilation of Justinian, the last traces of the perpetual tutelage of women had disappeared from the Roman law.

The change which the position of the married woman underwent in the Roman law is somewhat similar, though its history is different.

The ancient law of slavery is a subject which has to some parts of the world a more practical interest than, happily, it now has to ourselves. Much industry and some learning, says Mr Maine, have been bestowed in the United States of America on the question, whether the slave was, in the early stages of society, a recognised member of the family? The answer to this question he sums up as follows:—

‘That the inferiority of the slave was not such as to place him outside the pale of the family, or such as to degrade him to the footing of inanimate property, is clearly proved, I think, by the many traces which remain of his capacity for inheritance in the last resort. It would, of course, be unsafe in the highest degree to hazard conjectures how far the lot of the slave was mitigated, in the beginnings of society, by having a place reserved to him in the empire of the father. It is, perhaps, more probable that the son was practically assimilated to the slave, than that the slave shared any of the tenderness which, in later times, was shown to the son. But it may be asserted with some confidence, of advanced and matured codes, that, wherever servitude is sanctioned, the slave has uniformly greater advantages under systems which preserve some memento of his earlier condition, than under those which have adopted some other theory of his civil degradation. The point of view from which jurisprudence regards the slave is always of great importance to him. The Roman law was arrested in its growing tendency to look upon him more and more as an article of property by the theory of the law of Nature; and hence it is that, wherever servitude is sanctioned by institutions which have been deeply affected by Roman jurisprudence, the servile condition is never intolerably wretched. There is a good deal of evidence that, in those American States which have taken the highly Romanized code of Louisiana as the basis of their jurisprudence, the lot and prospects of the negro population are better in many material respects than under institutions founded on the English common law, which, as recently interpreted, has no true place for the slave, and can only, therefore, regard him as a chattel.’

In progressive societies the history of law presents us with one movement which is uniform. This is the gradual dissolution of family dependency, and the growth of individual obligation in its place. The individual becomes steadily substituted for the family, as the unit of which civil laws take account. Apparent retardations only arise from the absorption into the more civilised society of archaic ideas and customs from a foreign source. In Western Europe the progress has been considerable.

‘The status of the slave has disappeared; it has been superseded by the contractual relation of the servant to his master. The status of the female under tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage, all the relations she may form are relations of contract. So, too, the status of the son under powers has no true place in the law of modern European societies. If any civil obligation

binds together the parent and the child of full age, it is one to which only contract gives its legal validity.'

The distinction between the 'law of persons' and the 'law of things,' so familiar to every English lawyer, and almost to every Englishman, from the pages of Blackstone, has been borrowed from the later philosophical lawyers of Rome. The history of personal status above traced has already indicated that these two branches of law have in their origin a very near point of approximation. Indeed, the further we go back, the more inextricably does the law of property seem blended with, or rather become lost in, the law of persons; and the broad distinction drawn by later jurists has had no little share in obscuring the real history of the institutions of private property. And if, in speculations on the origin of the social relations in a political community, it has been the custom to indulge the imagination and the fancy, and to neglect the method of historical investigation, still more do we find this in the speculations upon the origin of rights of property. And the practical influence of these theories has been still more important and more distinctly marked.

When we read the disquisitions of the great jurists of the Antonine age upon the *natural* modes of acquiring property, which preface their writings on the more practical part of the subject, they appear to have a simplicity and want of pretension, contrasting strangely with the weighty results which have been hung upon them by a later age. Historically, the most important of what they called the modes of acquiring property taught by *natural reason*, was *occupatio*,—namely, taking what belonged to no one with the intention of appropriating it. But from a doctrine which meant little more than that, if a boy finds a marble (being a *res nullius*), and puts it into his pocket, it becomes his, was built up a theory, sanctioned by the influence of the great continental jurists, which enabled the good fortune of a few navigators in the fifteenth century to raise a claim to hold the sovereignty of a continent against all the world.

To the same source—namely, the philosophic Roman jurists—may be traced the elaborate expositions of the origin and nature of rights of private property, which, from Blackstone downwards, are usually made to preface systems of property law, and the favourite disquisitions upon the sacredness of the rights so explained, which pretend to answer, while they provoke, the attacks made by shallow and ill-conditioned reasoners against the institution of property itself. The mistake in the whole argument of this kind arises from the at-

tempt to take a loftier ground than that from which we can command any view of the subject, and to appeal to a higher order of right than that which will solve the questions raised.

But if we descend to a lower ground, and ask how the institutions of property actually originated, how they gradually assumed shape, how individual rights became recognised, respected, and capable of transmission, the problem becomes one of interest, because hopeful of approximate solution. And here ancient law, and especially the law of persons, comes to our aid; and in the period when the idea of contract vanishes, and private law seems to confine itself to cognizance of status, we seem to be approaching the source of the institution of property itself.

We arrive at least at a stage where all the *a priori* theories regarding the kind of acts in which property originate receive a distinct and complete contradiction. The 'natural modes' of acquiring property—occupation, tradition, and the like—are always conceived as the acts of individuals. But ancient law knows next to nothing of individuals. It is concerned, not with individuals, but with families; not with single human beings, but with groups. And hence the intimate connection between the history of proprietary rights and the law of persons. It is clear that under the relations of personal status in ancient law, the isolation of individual proprietary rights familiar to modern conceptions would have been impossible. And there is a great deal of evidence to lead to the conclusion, that individual rights of property are historically preceded by a system of co-ownership within the agnatic community, from which they must have been gradually extricated in the advance of civilisation. In this inquiry, we are not much aided by the Roman jurisprudence; for it is precisely the Roman jurisprudence, as transformed by the theory of natural law, which has bequeathed to us the impression that individual ownership is the normal state of proprietary right, and that ownership in common by groups of men is only an exceptional state of property. But here we are aided by observing a form of ownership existing in a less progressive branch of the Indo-European family which rivets our attention, because it discloses a state of proprietary rights for the conception of which our studies in the ancient law of persons have already prepared us. The village community of India is at once an organized patriarchal society and an assemblage of co-proprietors. This village community is known to

be an institution of the most remote antiquity, and of this there is abundant intrinsic evidence; but if that were wanting, we are aided by finding its counterpart even in those parts of Europe which have been least affected by the transformations of feudalism. The Russian villages are shown, by the most recent investigations of M. de Haxthausen, M. Tengoborski, and others, to be not fortuitous assemblages of men, but naturally organized communities like those of India; and though the peasants were within historical times converted into the *prædial*, and, to a great extent, into the personal serfs of the seignior, the pressure of this superior ownership never entirely crushed the ancient organization of the village.

If we were now to ask how these archaic communities themselves became organized, and to attempt to trace the steps by which property became accumulated in the hands of the community itself, we should be going far beyond the sphere of historical inquiry. It may be open to question, whether we should not be brought at last to the 'natural modes' of acquiring property, already discussed. But the gradual accumulation of property, and even the growth of the desire to accumulate, must more or less grow step by step alongside of the organization of the community itself; and if it should be found that the very desire of accumulation should be of less antiquity than the social organization, we should be right in saying that in co-ownership lies the source of the institution of property.

More interesting, however, will be the inquiry, how out of this ownership individual rights of property become extricated. Difficult as the problem would be to work out in detail, our studies in the law of persons have at least led to the conclusion, that the growth of individual rights of property must correspond in some degree with the gradual recognition in law of the individual as distinguished from the family group. The greatest engine, however, in effecting this extrication is the growth of contract. The growth of contract does not belong entirely to the history of law. Contract itself, or rather convention, at least in a rudimentary form, must long exist in fact before it receives recognition in a system of law. But on that very account the history of contract as a part of law itself is of the utmost interest. The largeness of the spheres respectively occupied by contract in modern and in ancient law, affords perhaps their most striking point of contrast. If it were possible apart from law to frame a history of the growth of the practice of mutual convention and agreement, it would be a history of the growth of the require-

ments of civilised intercourse. The history of contract law is that of the invention of machinery whereby those requirements are met, and the transactions they give rise to facilitated and secured. To point out how much of that machinery we owe to the great jurists of Rome is one of Mr Maine's favourite topics. But this is an inquiry we have not space to pursue further.

NOTES IN THE INNER HOUSE.

FIRST DIVISION.

GRANT'S TRUSTEES v. GRANT.

Conditio si hæres sine liberis decesserit.

AMONG other points raised in the prefixed case, the important and interesting question of the extension of the doctrine of the implied conditional institution of children to the case of settlements of heritable property, deserves the attention of the profession. It is not a little remarkable, considering the number of cases upon this condition which had previously been presented for decision, that the question of its applicability to heritable property should only now be raised for the first time. Our professional readers will, we have no doubt, be anxious to form an opinion for themselves as to the soundness of the decision, giving a legacy of the residue of heritage to the heir-at-law. With that view, we shall state briefly the import of previous decisions on this branch of the law; having first explained the import of the judgment in *Grant v. Grant*, to which we have referred.

' By a general disposition and settlement, dated 21st February 1850, Lady Grant appoints her son, Robert Grant of Tillyfour, her trust-dispensee of all other heritable estate belonging to her not specially conveyed by the other deeds, and also her sole executor and universal dispensee in moveables. These are conveyed for the purposes, and for discharging the legacies or other burdens, to be set forth in any writing under her hand. By another deed of the same date, she leaves annuities to her daughters, Ann and Louisa, and bequeaths sundry other legacies; " and with regard to the residue of my means and estate, both heritable and moveable, conveyed by my said general disposition and settlement, I appoint my said executor to hand over the same, when realized, to my trustees acting under the foresaid conveyance of Denham Green, to be applied by them for the comfortable support of my son, the said Sir James Grant, in manner therein provided, during his life, or, in the event of such residue or part of it not being required for that purpose, to be invested by my said trustees from time to time on such securities, real or personal, as they may consider adequate; and which residue and accumulations thereof shall be disposed of upon the said

Sir James Grant's restoration to a sound state of mind, or upon his death, in manner therein directed."

'The true point of controversy is, what Lady Grant must be held to have instructed by this deed with reference to the interests of the parties now in the field. It is pleaded on behalf of Sir Isaac Grant, that the right given to Robert Grant, and which is given to him in this case *without mention of heirs*, must be held to have never vested, in consequence of the predecease of Sir James, and that both Denham Green and the residue are intestate succession of Lady Grant. On the other hand, it is pleaded on the part of the children of Robert Grant, that the right to both these subjects must be held to have passed to them, by application of the condition *si sine liberis decesserit*. A subordinate question is raised by these children amongst themselves, how, in that event, the property is to be held distributable.

'Lord Ordinary Kinloch held that the intention was that Woodhill, the furniture, Denham Green, and the residue should go to Robert Grant's children, the heritage to his eldest son, and the executory to his other children; and the Court adhered, Lord Curriehill dissenting as to Denham Green, and holding that the doctrine *si sine liberis* did not apply.'

We are not concerned at present with that principle which has elsewhere been described as a modification of the *Querela inofficiosi testamenti*, and according to which a testator who becomes the father of a family after the execution of a will, and dies without altering his testamentary dispositions, is considered, notwithstanding, to have intended to revoke them. The condition *si hæres decesserit sine liberis* does not involve the necessity of supposing any revocation of the testamentary dispositions actually made, but superadds to them a conditional institution of the legatee's children in the event of the legatee predeceasing the testator. The rule is borrowed from the civil law (Cod. 6, 25, 6; 6, 42, 30; Dig. 35, 1, 102); and, like many of the civil law doctrines in relation to legacies, has undergone considerable modifications in its passage through the channel of decisions. Hitherto it has been limited in its application to settlements either of pure moveable succession, or settlements of mixed succession, which have been dealt with in the character of personality. The scope and purport of all the decisions prove that the condition is one which proceeds on the supposition of equal favour on the part of the settlor for all the members of the family to which he has placed himself *in loco parentis*—a supposition which is incompatible with the principle of enforcing the condition for the benefit of an eldest son.

The explanation which has most usually been given of this rule is, that the legacy is supposed to have proceeded from *pietas paterna*—from the desire to make a provision for the testator's own family. Accordingly, in the earlier cases, of which *Dickson v. Brown*, 14 S. 938, and *Wilkie v. Jackson*, are instances, the application of the

condition was confined to legacies to all the testator's own children, the issue of the favoured child being preferred in virtue of the implied condition to other representatives in the same degree. The cases of *Walker v. Park*, 21 D. 286, and *Robertson v. Houston*, 20 D. 989, extended the benefit of the condition to the issue of grandchildren individually favoured, giving them a preference over other descendants of the testator in the same degree.

The extension of the doctrine to collaterals has been more cautious. A legacy left to nephews, nieces, or cousins, will not be understood to have been given as a family provision, unless all who are in the same degree of relationship, or at least all the children of one brother or uncle, are expressly instituted (*Christie v. Paterson*, 1 S. 543; *Thomson's Trs. v. Robb*, 18 D. 1826). Where a legacy is given to an individual sister or niece (*Fleming v. Martin*, M. 8111; *Hamilton v. Hamilton*, 16 S. 478), or to a stranger in blood (see *Black v. Valentine*, 6 D. 689), the legatee is regarded as *persona prædilecta*; and, in accordance with this view, the legatee's children take no interest in it, unless it have previously vested in himself by survivance of the testator.

Through all the decisions upon the application of the condition there runs this principle: *first*, that there must be presumptive evidence of an intention on the part of the testator to give the legacy to the family; and, *secondly*, that the condition is to be so interpreted as to aid that intention. The benefit of the condition, in every case that has hitherto occurred, has been given to *all* the children of the family; and in the case of collaterals, it is settled that the benefit of the condition does not accrue, unless the institute himself be nominated in the character of one of a family.

There is another point which has a most material bearing on the question as to the applicability of the condition to heritable destinations. It is this: the condition is one which operates against the legal course of succession. It applies only to bequests in favour of near relatives; and the necessary effect of its enforcement is to disappoint other relatives in the position of next of kin. Even a clause of survivorship among legatees equally related, is held insufficient to exclude the application of the implied condition. (See *Young v. Donaldson's Trustees*, 14 Feb. 1862, H. of L., the latest case.) The operation of the condition is therefore not favourable to an extension, such as would give the benefit of a legacy of heritage to the heir-at-law. On the whole, although the decision in Grant's case

does not stand opposed to precedent, we are inclined to regard it as a doubtful innovation, and to concur in the view taken on this point by Lord Curriehill.

SECOND DIVISION.

SOMERVILLE *v.* THE NORTH BRITISH RAILWAY INSURANCE SOCIETY.—*June 27.*

Voluntary Association—Title to Sue and Defend.

THE North British Railway Insurance Society is a mutual insurance association, composed of servants of the Railway Company, for the purpose of affording relief to members injured in the discharge of duty. By the rules, provision is made for the appointment of a certain number of members as a committee of management, to whom is entrusted the power of investigating into and adjudicating upon all claims, and of paying them if sustained. The pursuer, who is the representative of a member killed on the railway, directed his action for relief against the individuals composing the committee, 'as members of the committee, for themselves, and as representing the Society.' The defenders pled—1. That the Society, not being incorporated nor registered, they could not be sued as representing it; and 2. That all parties having an interest were not called. The Court repelled those pleas; holding that, under the rules, the committee were the proper representatives of the Society with reference to such claims, and the parties against whom execution should go out against as depositaries of the Society's funds.

As the Court did not seem to regard this Society as falling under the category of Friendly Societies, it may be doubted whether the decision would apply to an unregistered society of that nature, it being the policy of the law to discourage Friendly Societies which refuse to conform to the statutory regulations. The Friendly Societies Consolidation Act (18 & 19 Vict., cap. 83), while it provides that a society whose rules are certified may sue or be sued by its trustee, expressly enacts (sec. 27), that the rules of the society, until certified, shall have no force and validity whatsoever; and perhaps no more effectual means could be taken of discouraging such unregistered societies, than the refusal to recognise their social existence in a Court of law. The difficulty of calling all the individual members of the association, numerous and fluctuating as such bodies generally are, must in many cases amount to an im-

possibility; and the consequent practical denial of legal redress must operate to deter the public from becoming members of, or contracting with, such associations. But in the case of a society not discountenanced by the law, which may have legal claims and liabilities, the rules of pleading, as well as substantial justice, are satisfied by allowing the society to sue and be sued in the name of a committee empowered to represent it, and against whom decree can be made effectual.

CHRISTIE v. RUXTON.—*June 27.*

Title-Deeds not a proper subject of Pledge.

In this case the Court refused to recognise the doctrine that title-deeds form a proper subject of pledge. The anomalous privilege which had been conferred upon a law agent, of retaining a client's titles till his business account was paid, had been introduced for special reasons, and was not to be extended to an impignoration of deeds for cash advances or pecuniary obligations generally. In point of legal principle, and on grounds of expediency, this judgment seems to be well founded, title-deeds and documents of debt being subjects—*extra commercium*—of no intrinsic worth, and valuable only as accessories of the land or debt, the impignoration of which would throw a novel and serious obstacle in the way of the free and safe transmission of the subjects which they represent.

ARMSTRONG v. CLARK.—*July 11.*

Reparation—Culpa—Scientia.

The pursuer, who was a dairy-maid in the service of the defender, and whose duty it was to bring the cows from the pasture-field to be milked, was attacked and injured by a bull kept in the field. In respect of the injuries sustained, she claimed damages from her master, who was the owner of the bull. It appearing on evidence that the bull was not known to its owner to be unusually dangerous, and in point of fact was not so, the Court assoilzied the defender. The Lord Justice-Clerk, in pronouncing judgment, took occasion to observe, that on the general question as to the legal obligation on the owners of domesticated animals, he did not think there was any substantial difference between the law of England and that of Scotland, and that the law of Scotland would not make the owner liable for a domesticated animal, unless, in the first place, the animal was vicious, and in the second place, its vicious propen-

sities were known to the owner. The other judges concurred in this doctrine, which, although negatived by some of the judges in the well-known case of *Orr v. Fleeming* (5 March 1853, 15 D. 486, reversed 3 April 1855, 2 M'Queen, 14), is supported by the authority of Lord Stair, who thus states the law (Inst. I. 9, 5):—‘Accession to delinquency is either anterior, concomitant, or posterior to the delinquency itself. Anterior is either by *command* or counsel, instigation or provocation, or by connivance in fore-knowing, and not hindering those whom they might and ought to have stopped, and that either specially in relation to one singular delinquency, or generally in knowing and not restraining the common and known inclination of the actors towards delinquencies of that kind, as when a master keeps outrageous and pernicious servants or beasts. And, therefore, in many cases, even by natural equity, the master is liable for the damage done by the beast. As is clearly resolved in the judicial law in the case of the pushing ox, which, if it was accustomed to push beforetime, the owner is liable for the damage thereof, as being obliged to restrain it, but if not, he is free. So the like may be said of mastiffs and other dogs; if they be accustomed to assault even their goods and cattle, and be not destroyed or restrained, the owner is liable.’

In the case of *Fleeming v. Orr*, which was an action for the value of sheep worried by a fox-hound, the late Lord Justice-Clerk is reported as having said, ‘Even if the dog had been better looked after, and if the simple fact had been, that somehow or other he had got loose, and had worried the sheep in this enclosed field, I should have held the defender liable.’ The judgment, however, did not proceed on this ground, but on the fact, that *culpa*, or negligence, had been proved on the part of the owner of the dog; and the reversal by the House of Lords proceeded entirely on the omission of this finding of *culpa* from the interlocutor of the Court of Session, to which they were confined in judging of the facts.

The Lord Chancellor carefully guarded his judgment when he said: ‘If a different rule (from that of the law of England) prevails in Scotland, and if there, it is sufficient to allege negligence on the part of the owner, without averring or proving his knowledge of the animal’s habits, it is not that the foundation of the action is different, but that the Scotch law does not so readily permit the owner of an animal to rely on the general consequences flowing from its being supposed to be an animal *mansuetæ naturæ*,—

a supposition which experience shows to be very often far from the truth, and which I am inclined to think that we in England have sometimes too readily acted on.' 'But however this may be, as the present interlocutor states no *culpa* whatever, I am clearly of opinion that it cannot be supported.'

Whether the rule of the law of Scotland be or be not the same as that of the law of England, the expediency of the principle, that the owner of a domesticated animal is not liable, unless aware that it was of unusually vicious propensities, is open to the gravest doubts. Such a doctrine proceeds on a broad general principle, utterly inapplicable to the variety of circumstances which actual cases present. The absurdity of the presumption, that with reference to all animals *mansuetæ naturæ*, *culpa* cannot exist without knowledge on the part of the owner of the animal's vicious habit, is well exposed by Lord Cockburn, when he says, (15 Dun., p. 487), 'The essence of the principle seems just to be, that every dog is to have one worry, and every bull one thrust, with absolute impunity—that is to say, without its master being liable. If this be the law of England, they seem to have an undue toleration for a first offence.' *Culpa* on the part of the owner is the foundation upon which redress is given; and it seems folly to hold that in every state of circumstances the owner of an animal *mansuetæ naturæ* is entitled to rely on the presumption that no harm will arise from leaving it at large, and that blame can only attach to him, when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits. The question of *culpa* is always one of circumstances; and this Lord Benholme seems to have felt when he observed, in the case of *Armstrong*, that the duty of the owner of such an animal might be very different with regard to the public on the public highway, from what it was in the case of an animal kept in a park to which only a servant had access. The question of negligence must depend on a host of circumstances—on the nature of the animal, the temptations in its way, their adaptation to its natural destructive tendencies, and the precautions under which it is kept. It cannot be maintained that the nature of all domesticated animals is absolutely harmless; and if the owner of such an animal is negligent in respect either of the place or manner in which it is kept—

that is to say, if he does not take the precautions proper in the circumstances to prevent the public being injured by its natural propensities, even where there is no unusual vice—he ought, on grounds both of justice and expediency, to be liable in redress. It is to be hoped that the Court, while expressing the rule as to the necessity of proving *scientia* so broadly, intended it to apply only to those cases where a domesticated animal, having no vicious propensities beyond those natural to its kind, is kept under precautions usual and suitable to its nature and to the surrounding circumstances.

THE MONTH.

Taxation of Country Agents' Accounts.—If the maxim, ‘Blessed is the nation whose annals are unwritten,’ be applicable to smaller communities, the legal profession at the present time has great reason for thankfulness. Our annals for this year are represented by a blank. We do not remember a year, since the commencement of our publication, when there was such an absolute want of material for commentary or criticism. There are no new measures affecting professional interests,—no agitation, either within or without the professional circle,—and scarcely a grievance worth complaining about, if we except the poverty-stricken aspect of the rolls of Court, and the causes which have contributed to bring about a result so unfortunate for those who are interested in the maintenance of our legal institutions. We have selected one of those causes for notice rather than for discussion. The ground of complaint is very well known in professional circles. The remedy is not far to seek; and we believe the grievance only requires to be fairly and temperately stated, to insure attention in the proper quarter.

Our readers are aware that, in a large proportion of the cases before the Court of Session, the ground of action originates out of Edinburgh, and especially in the large mercantile towns. In such cases, the clients naturally resort, in the first instance, for professional advice to a resident lawyer; and if the dispute is carried into the Court of Session, it is upon the advice and through the instructions of the local agent. Whenever this is the case, professional usage (resting in this respect upon the soundest professional principles) requires that the correspondence between the Edinburgh

agent and his client should be conducted through the intervention of the local solicitor. It is usually the wish of the client himself that his local agent should be consulted in regard to all matters of importance involved in the action ; and it is right that he should be so consulted, were there no other reason for it than that the local solicitor is conversant with the client's affairs. Correspondence with the local solicitor is, in the majority of cases, just as necessary and as legitimate a branch of litigation as the employment of counsel, the precognition of witnesses, or any other of the numberless items in an account of expenses that might be selected. Yet the auditor of Court, acting upon a view of the law which may, for aught we know, be fully justified by precedent, refuses to allow correspondence as a charge against the unsuccessful party.

The principle of taxation which has led to such a result is, that the party is not entitled to charge against his opponent the expense of any preparation for the suit which he is able to make without professional assistance. He cannot draw his own pleadings, or lodge them, or instruct counsel. The law, it is said, allows the expense of these strictly judicial proceedings against the other party, because the client cannot perform the work in person ; but as he may personally give instructions for the prosecution of his suit, and may personally prepare and furnish his Edinburgh agent with a memorandum of the information he requires, he is not allowed to charge the expense of doing this through the instrumentality of another agent. Double agency, like the employment of additional counsel, is a luxury, the expense of which must be defrayed by the party indulging in it.

Admitting that there is some substance in these considerations, we think that there are others of a more practical kind which ought to outweigh them. It is fair, perhaps, that such matters of business as can be performed by the client without sacrifice of time or risk of inaccuracy should be held to be so done, for the purpose of keeping expenses within reasonable bounds. But we do not see why a litigant should be bound to give his *time* to his own case, if that time can be saved by the employment of a local agent. Nor do we think that special knowledge of Court practice, of the rules of evidence, and the like, should be expected of a client, when the question is as to the expense to which the party has been put in maintaining his rights. The present rule of taxation violates both conditions. In the first place, it assumes that the client has in every case such a

knowledge of his case as to be able to give instructions during its progress by correspondence. To a large proportion even of the educated class, this is impossible. Their ignorance of practice renders necessary explanations on a variety of matters which cannot possibly be anticipated by the solicitor. Hence arises a necessity either for the employment of a local agent, or for the client coming to Edinburgh to consult his Edinburgh agent. In one or other of these ways, we think, the suitor is entitled to have the advantage of a direct communication with his solicitor, and that the expense of this, being necessary, ought to be borne by the opposite party. Further, it seems to be clear—too clear, we think, for argument—that the client cannot in reason be expected to make a sacrifice of time by coming to Edinburgh to give personal instructions. There is no reason why he should even be obliged to communicate in writing with his own hand. Five minutes' conversation with the local solicitor will in many cases be sufficient for purposes of explanation, as well as for giving instructions for a reply; which, if the client were obliged to conduct his correspondence personally, would either not have been written at all, or only at an expenditure of time and trouble, the saving of which appears to us to be a most legitimate charge against the opponent.

We have only one observation to make upon the argument, that the client ought to give, by anticipation, *all* the information necessary for the conduct of the case in the memorial and instructions which usually precede the summons or defences, and the expense of which is usually allowed as a charge against the opponent. This might be a fair enough rule under a rational system of pleading, which permitted of the parties raising their own issues upon record. Truth, however, compels us to say, that under the existing system, it is in most cases impossible for any litigant to foresee the kind of evidence, or even the kind of preparation, that will be requisite for the vindication of his rights. A vicious practice permits of the ground of action or defence being changed at any time before the closing of the record; and, after all, the record is of little use to guide the litigant as to the future conduct of his case, as it may receive a colour from the issue afterwards adopted very unlike anything that was in the minds of the parties when the pleadings were prepared. While such is the uncertainty attending the determination of the question which the parties are to try, it is little better than a mockery to say that the client ought

to have given instructions for everything before *litis contestation* has been joined. The expense of occasional correspondence is inevitable; and there is really nothing to prevent its being allowed, further than the existence of a feeling against allowing much to local agents. The matter is in the hands of the Court, who have power to regulate the principles as well as the scale of taxation; and we shall be disappointed if some attempt is not made to relax a rule fraught with no benefit to litigants, and operating very injuriously upon the interests of a most important section of the practitioners of the law, and through them upon the whole profession.

Box Days.—Edinburgh, 2d July 1862.—The Lords appoint Thursday, *the 4th day of September*, and Thursday, *the 16th day of October*, to be Box Days in the ensuing vacation.

Extended Sittings of the Court.—Edinburgh, 16th July 1862.—This day the Lords passed an Act of Sederunt extending the Inner House sittings, by appointing the First and Second Divisions to meet upon Monday, the 3d of November, for the disposal of causes.

(Signed) DUN. McNEILL, *I.P.D.*

The Bar.—Mr Francis Deas was admitted a member of the Faculty of Advocates on 27th May last; and Messrs Charles Stewart and Donald Crawford were admitted members of the same body on 15th ult.

BILL CHAMBER ROTATION OF JUDGES.

AUTUMN VACATION, 1862.

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| Monday, 21st July, to Saturday, 2d August, . . . | Lord CURRIEHILL. |
| Monday, 4th August, to Saturday, 16th August, . . . | „ BENHOLME. |
| Monday, 18th August, to Saturday, 30th August, . . . | „ MACKENZIE. |
| Monday, 1st September, to Saturday, 13th September, . . . | „ KINLOCH. |
| Monday, 15th September, to Saturday, 27th September, . . . | „ ORMIDALE. |
| Monday, 29th September, to Saturday, 11th October, . . . | „ CURRIEHILL. |
| Monday, 13th October, to Saturday, 25th October, . . . | „ BENHOLME. |
| Monday, 27th October, to Saturday, 8th November, . . . | „ MACKENZIE. |
| Monday, 10th November, to Meeting of Court, . . . | „ KINLOCH. |

AUTUMN CIRCUITS, 1862.

NORTH.

LORDS JUSTICE-CLERK AND JERVISWOODE.

Inverness—Wednesday, 17th September.*Aberdeen*—Tuesday, 23d September.*Perth*—Monday, 29th September, at 12 noon.ALEXANDER MONCRIEFF, Esq., *Advocate-Depute*.ALEXANDER STUART, *Clerk*.

SOUTH.

LORDS COWAN AND NEAVES.

Jedburgh—Tuesday, 23d September.*Dumfries*—Friday, 26th September.*Ayr*—Wednesday, 1st October.A. BURNS SHAND, Esq., *Advocate-Depute*.WILLIAM HAMILTON BELL, *Clerk*.

WEST.

LORDS DEAS AND ARDMILLAN.

Stirling—Friday, 5th September.*Inveraray*—Wednesday, 10th September.*Glasgow*—Monday, 15th September, at 12 noon.ADAM GIFFORD, Esq., *Advocate-Depute*.JAMES AITKEN, *Clerk*.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

DINGWALL'S TRUSTEE v. LORD KINTORE'S TRUSTEE.—*June 19.**'Landlord and Tenant—Reduction—Issue.*

In this action, raised by Dingwall's trustee for declarator that Dingwall held a lease for nineteen years of two farms belonging to Lord Kintore, and of reduction of a renunciation of the lease granted to Lord Kintore's trustee, the pursuer formerly proposed two issues:—1, Whether there was such a lease, and whether Lord Kintore's trustee had fraudulently obtained the renunciation? and 2, Whether the renunciation had been granted within sixty days of bankruptcy, and in violation of the Act 1696, c. 5? Both issues were disallowed by the Court, but the pursuer was allowed to give in amended issues. The case then came before the Court on an amended issue, which put the question, Whether there was a lease? and whether the renunciation had been granted by Dingwall while he was insolvent, without value, and in defraud of his creditors. The Court refused the issue on the ground that the pursuer's statements on record in regard to Dingwall were self-contradictory. While the pursuer in one

part of the record charged Dingwall with fraudulently granting the renunciation, in another he averred that in consequence of severe illness he was 'incapable of understanding or realizing his position, or of transacting any important business.'

BELFRAGE *v.* DAVIDSON.—*June 20.*

Trust—Revocation—Mutual Settlement.

In 1833, Misses Helen and Sarah Davidson, two sisters, executed a mutual conveyance of their whole property, heritable and moveable, to themselves, to the survivor, and to her heirs, executors, and assignees, reserving their respective liferents, and with power during their joint lives to alter. On March 23, 1835, they executed another deed, altering the former in so far as it contained a destination in favour of the heirs and assignees of the survivor, and restricting the right of the survivor to a liferent; but this deed contained a clause reserving power to the granters, or to the survivor of them, to alter it at any time during their joint lives or the life of the survivor. Helen Davidson died in 1839. In 1841, Sarah Davidson, executed a codicil, revoking the deed of 1835 in so far as it restricted the right of the survivor to a liferent, and declaring that the survivor should have an absolute right of fee. She thereafter executed a conveyance to the defenders as trustees, and made certain provisions in favour of the pursuers. The pursuers brought the present action of declarator to establish their right. The defenders maintained that the surviving sister had no power to alter the deed of 1835.

The Lord Ordinary (Jerviswoode) decided in favour of the pursuers, and the Court adhered.

GARDNER *v.* WALKER.—*June 24.*

Bankruptcy—Recal of Sequestration.

This was a petition for recal of sequestration at the instance of James Gardner, miller, Brownieside, against Robert Walker of Brownieside, and Alexander Walker, Worrside, trustee on the sequestrated estate of James Gardner. The sequestration was awarded on the petition of Mr Robert Walker of Brownieside, the landlord of Mr Gardner. Immediately previous to presenting the petition for sequestration, Mr Walker had sold off everything belonging to the alleged bankrupt; and it was stated on the part of Mr Gardner that the sequestration should be recalled on two grounds: first, that there was no estate to sequester, except a claim at the instance of Mr Gardner against his landlord, which was presently depending in the Court of Session; and, secondly, the present application for sequestration had been presented by Mr Walker chiefly for the purpose of making Mr Gardner find caution in that action, which, of course, it was not expected he would be able to do, and that the intention in making the application was not the *bona fide* one contemplated by the bankrupt statute, viz., the realization of the bankrupt's estate, and the distribution thereof amongst the creditors.

Lord Ormidale, on 4th inst., recalled the sequestration, principally upon the ground that there was *no estate*, and the Court adhered. Their Lordships, while indicating doubts that the non-existence of any estate was a sufficient reason for recal of a sequestration, were of opinion (Lord Deas doubting but not dissenting) that in the circumstances this sequestration

ought to be recalled, the only estate being a claim of damages against the petitioning creditor, and the trustee and commissioners being virtually his nominees, and his obvious object being to put an end to the action of damages against himself, without allowing it to be tried for the benefit of all the creditors. The reclaiming note was refused, with expenses.

M. P., SMITH'S TRUSTEES.—June 27.

Property—Competition—Equitable Estate.

This action was raised by the trustees of Mungo Smith, who died in 1814, for the purpose of disposing of the residue of his trust estate. By the trust deed the trustees were directed, after realizing, to pay the residue to the truster's son, John Smith. John Smith died in 1830, before the estate had been realized, leaving a general trust disposition and settlement. A claim was lodged in this action by Alexander Grant, for himself and other creditors of John Smith, for the residue, which he maintained had been carried by John Smith's general disposition and settlement to his trustees. This claim was opposed by other claimants who had expedite confirmations as executor-creditors of John Smith, who maintained that as John Smith's trustees had not confirmed, the residue remained in the *hereditas jacens* of his estate in so far as not taken up by them as executor-creditors. On this point, the Lord Ordinary (Kinloch) held that the executor-creditors were preferable, having acquired a *jus in re*, while the trustees had merely a *jus ad rem*.

Another question arose between one set of creditors who had confirmed as executor-creditors of John Smith in 1852, and who had valued his estate at L.4000 in the inventory, and another set who had expedite a confirmation in 1854 to the excess of said estate above the valuation in the former inventory, amounting to L.18,900. The Lord Ordinary held that the former confirmation was only effectual to the amount of the inventory, and that the second carried the balance. The Court adhered on both points.

GRANT'S TRUSTEES v. GRANT AND OTHERS.—July 2.

Trust—Conditional Institution—Implied Institution.

This process involves the succession of the late Lady Grant of Monymusk, and depends on a variety of deeds. The properties involved are, (1.) the lands of Woodhill, and furniture in the mansion-house of Woodhill; (2.) the house and grounds of Denham Green; and (8.) the general residue of the estate.

Lady Grant died on 15th December 1852. She was survived by three sons and four daughters—another daughter, Mrs Farquharson, having predeceased, leaving children. Of the three sons, the eldest was the then Sir James Grant—the second, Isaac, now Sir Isaac Grant—the youngest, Robert Grant of Tillyfour. Robert Grant died on 15th March 1857, leaving two sons and a daughter. Sir James died on 30th August 1859. Sir Isaac Grant still survives. Sir James and Isaac Grant were both, at their mother's death, in a condition of mental incapacity, from which Sir James never recovered, and in which Sir Isaac still remains.

The lands of Woodhill were conveyed by Lady Grant to trustees by a deed, bearing date 30th April 1844, the conveyance also containing the household furniture, plate, and other effects in the house of Woodhill.

The purpose of the trust is declared to be, that the house of Woodhill and furniture should be maintained as a residence for Sir James Grant, with whom, by that deed (though this direction was altered by an after codicil), Lady Grant directed that his brother Isaac should reside during their joint lives. She appoints, 'that after the death of my said son Sir James Grant, whether he survives my son Isaac Grant or not, my trustees above named, or others to be assumed as after mentioned, shall denude themselves of this trust, and execute a disposition and conveyance of the said property of Woodhill, with the house, offices, furniture, and household goods, and others foresaid, to my third son, Robert Grant of Tillyfour, *and his heirs.*' But this direction is qualified by an after provision, 'that if it shall happen that my said son, Sir James Grant, recovers from his present unfortunate state of derangement, and becomes restored to a perfect sound mind, in that case, the said property of Woodhill, and other effects there, shall be at once conveyed to him, his heirs and assignees, absolutely, and without restriction, with the furniture and other effects therein.' The question now arises, Who has right to Woodhill, and the furniture and effects conveyed with it? It is contended, on the part of Sir Isaac Grant, that, in consequence of Robert Grant predeceasing Sir James Grant, no right was ever vested in Robert Grant; and the property must be held intestate succession of Lady Grant. On the other hand, Mr Archibald Grant, the eldest son of Robert Grant, maintains that under the destination 'to Robert Grant, *and his heirs,*' the property now devolves on him as the heir-at-law of Robert Grant.

The question as to Denham Green, and that as to the general residue of Lady Grant's estate, arises out of another series of deeds. By a deed of trust, dated the 7th November 1850, Lady Grant conveys the property of Denham Green to certain trustees, for the purpose, in the first instance, of applying the revenue arising from it in keeping the house and grounds of Woodhill in repair, and otherwise promoting the comfort of Sir James Grant; and then of accumulating and investing, 'upon trust securities, real or personal, as they shall think proper,' whatever of the revenue was not necessary for this object. The deed thereafter proceeds thus:—'And I direct and appoint that, upon the death of the said Sir James Grant without recovering from his present unfortunate state of mind, my said trustees shall immediately hand over to my son, Robert Grant, Esq. of Tillyfour, any balance of the revenue arising from Denham Green, or the price thereof, if sold, which may then be in their hands; and also the whole, or such part of the residue of my other means and estate which they may have received from my executor, the said Robert Grant, together with any accumulations thereof which may, in the above event, be in their hands; and shall also convey and make over to the said Robert Grant the subjects hereby disposed, or, if sold, the price obtained therefor, *to be used and disposed of by him as his own absolute property.*' There follows a similar provision as in the disposition of Woodhill, that, in the event of Sir James's recovery, the whole should be 'at once handed over or conveyed to him, his heirs and assignees, absolutely and without restriction, to be thenceforth used and enjoyed by him as his absolute property.' A power to sell Denham Green, but no express direction to do so, is contained in this deed—the price to be held on the same trust with the property itself.

By a general disposition and settlement, dated 21st February 1850, Lady Grant appoints her son Robert Grant of Tillyfour her trust disponee of all other heritable estate belonging to her not specially conveyed by the other deeds, and also her sole executor and universal disponee in moveables. These are conveyed for the purposes, and for discharging the legacies or other burdens, to be set forth in any writing under her hand. By another deed of the same date, she leaves annuities to her daughters, Ann and Louisa, and bequeaths sundry other legacies; 'and with regard to the residue of my means and estate, both heritable and moveable, conveyed by my said general disposition and settlement, I appoint my said executor to hand over the same when realized to my trustees acting under the foresaid conveyance of Denham Green, to be applied by them for the comfortable support of my son, the said Sir James Grant, in manner therein provided, during his life, or, in the event of such residue or part of it not being required for that purpose, to be invested by my said trustees from time to time on such securities, real or personal, as they may consider adequate; and which residue and accumulations thereof shall be disposed of upon the said Sir James Grant's restoration to a sound state of mind, or upon his death, *in manner therein directed.*'

The true point of controversy is, what Lady Grant must be held to have instructed by this deed with reference to the interests of the parties now in the field. It is pleaded on behalf of Sir Isaac Grant, that the right given to Robert Grant, and which is given to him in this case *without mention of heirs*, must be held to have never vested, in consequence of the predecease of Sir James, and that both Denham Green and the residue are intestate succession of Lady Grant. On the other hand, it is pleaded on the part of the children of Robert Grant, that the right to both these subjects must be held to have passed to them, by application of the condition *si sine liberis decesserit*. A subordinate question is raised by these children amongst themselves, how, in that event, the property is to be held distributable.

Lord Ordinary Kinloch held that the intention was that Woodhill, the furniture, Denham Green, and the residue should go to Robert Grant's children, the heritage to his eldest son, and the executory to his other children; and the Court adhered, Lord Curriehill dissenting as to Denham Green, and holding that the doctrine *si sine liberis* did not apply.

EDINBURGH AND LEITH GLASS COMPANY v. THE NORTH BRITISH RAILWAY COMPANY.—July 5.

Lands Clauses Act—Intersectional Damage.

This was an action at the instance of the Edinburgh and Leith Glass Company for the recovery of L.3300, being the amount of compensation claimed by them under the 68th section of the North British Railway Consolidation Act, 1858, conform to notice given in writing to the defenders on 18th October 1860. By the section of the statute the pursuers are entitled to compensation from the defenders 'for such loss, damage, or inconvenience (if any) as they may sustain by reason of their being deprived by the passing of this Act of any rights or privileges secured to them under any contract of agreement now in force, and binding on the Company, or to which they may be otherwise entitled;' and such com-

compensation is to be settled in the manner provided by the Lands Clauses Act for the settlement of cases of disputed compensation. The Glass Company accordingly served on the Railway Company a notice, stating that they had been deprived of all access from the north to their property situated near the Old Leith Harbour, and of the rights and privileges secured to them under a contract or agreement entered into between them and the proprietors of the Leith branch of the Edinburgh and Dalkeith Railway, dated 22d and 30th August 1836, and recorded 5th September 1836: And whereas the said Edinburgh and Leith Glass Company had sustained great loss, damage, and inconvenience in consequence of being deprived of access as aforesaid, and of the rights and privileges secured to them under the said contract or agreement: 'Now therefore, we, the Edinburgh and Leith Glass Company, do hereby, in pursuance of the authority of the said Act, and the Acts therewith incorporated, give you, the said North British Railway Company, notice, that we claim from you the sum of L.3300, as compensation for the loss, damage, and inconvenience sustained by the said Edinburgh and Leith Glass Company, by reason of being deprived of access as aforesaid, and of their rights and privileges under the said contract or agreement: And further, take notice that unless you are willing to pay to us the said sum of L.3300, it is our desire to have the amount of compensation due to us in manner aforesaid determined by a jury.' The Railway Company not having applied to the Sheriff within twenty-one days after service of the notice to summon a jury for settling the pursuers' claim, the latter maintained that they were entitled to decree for the sum claimed. The defenders pleaded:—'No compensation whatever being due by the defenders to the pursuers, the pursuers' notice and claim was incompetent, and the defenders could not be called upon to summon a jury under the Lands Clauses Consolidation (Scotland) Act, 1845. In particular, the pursuers not having sustained any loss, damage, or inconvenience whatever, and not having been deprived of any rights or privileges secured to the pursuers under any contract or agreement in force and binding on the defenders or otherwise, the pursuers' claim was wholly unwarranted, and no jury could be competently called to fix the amount thereof.' The Lord Ordinary dismissed the action, holding 'that the notice of claim libelled, given by the pursuers to the defenders, does not set forth in a proper and sufficient manner any just or relevant ground upon which the defenders could be required to make compensation to the pursuers in terms of the North British Consolidation Act, 1858, referred to, and that on that footing the defenders were not bound to take proceedings upon the said notice of claim, and are not now liable to pay to the pursuers the amount of compensation claimed by them.'

The pursuers reclaimed, and the Court were of opinion that the claim made by them was neither well made nor well founded in law. Their Lordships, therefore, assoilzied the defenders, with expenses.

CAUTION FOR JUDICIAL FACTOR.—*July 8.*

Judicial Factor—Caution.

William Steven, accountant, Dundee, was appointed, on the petition of Mrs Keating and others, judicial factor on the estate of the late Daniel Collins. He proposed a cautioner, who was rejected. He now proposes a bond of caution of the British Guarantee Association. It was argued

that such a bond could be received under cases decided under the Pupils' Protection Act, 12 & 13 Vict., cap. 51, sec. 27, which allows, upon cause shown, caution to be found to a specified amount. The Court held that the Pupils' Protection Act did not apply, and that under the Act of Sederunt, 13th February 1730, they had no power to limit the amount of caution, and that a bond of the British Guarantee Association would not be sufficient.

ANDERSON v. ADAM AND ANDERSON.—*July 8.*

Accounting—Diligence.

This was an action of count and reckoning at the instance of William James Anderson, formerly of Techmuiry, in Aberdeenshire, against Messrs Adam and Anderson, advocates in Aberdeen, concluding that those gentlemen should be ordained to produce a full and particular account of their intromissions as trustees for the pursuer, under a trust disposition and conveyance granted by him; and also as his factor and law agents from 1837 to the present date. Mr W. J. Anderson was a partner of the firm of Arbuthnot and Anderson, of Peterhead; and as such, and individually, it was said, had obtained very large advances from the Edinburgh and Glasgow Bank. This resulted in proceedings at the instance of the bank, in which they obtained judgment against Arbuthnot and Anderson, on the decree in which they used arrestments in the hands of Messrs Adam and Anderson, as individuals, as trustees or agents, or any manner of way, for L.40,000. Arbuthnot and Anderson had also been mixed up in transactions with the North of Scotland Bank, and had conveyed to that bank some of their estates in security of advances. The debt due to the Edinburgh and Glasgow Bank led to a trust conveyance by Arbuthnot and Anderson in favour of trustees for that bank, and subsequently to a transaction between that bank and the North of Scotland Bank and conveyance, whereby the Edinburgh and Glasgow Bank, with consent and concurrence of Mr W. J. Anderson, as a partner of Arbuthnot and Anderson, and as an individual, conveyed over to the North of Scotland Bank the whole reversionary interest in the pursuer's estate, covered by the trust conveyance in favour of the Edinburgh and Glasgow Bank, or by the arrestments in the hands of the defenders, with all right to call them to account. Such accounting, it was said, afterwards took place with the North of Scotland Bank as assignees of the Edinburgh and Glasgow Bank and the pursuer, and the balance on that accounting was paid over to the North of Scotland Bank, who granted a discharge to the defenders 'of their whole actings and intromissions as trustees appointed by the pursuers, and of all sums which might be due by them, or either of them, to the North of Scotland Bank, or the Edinburgh and Glasgow Bank, or to Arbuthnot and Anderson, or to the pursuer under the trust, or other matters or transactions, or under and in virtue of the arrestments, and all right competent to me (the manager of the North of Scotland Bank), or to any of the parties before named, to call the said Adam and Anderson, and William Adam and Alexander Anderson, to account.' The defenders in consequence pleaded—1st, That the pursuer had no title to sue; 2d, That they had accounted for their intromissions to the pursuer's assignees; 3d, That

on that accounting they had obtained a discharge from those assignees, and that, therefore, the action ought to be dismissed.

The Lord Ordinary was inclined to dismiss the action as one which could not be insisted in without the concurrence of the Edinburgh and Glasgow Bank, or the North of Scotland Bank; but he granted a commission and diligence for the recovery of writings tending to show that the defenders managed and intromitted with the pursuer's means and estate, other than the subjects mentioned. The defenders reclaimed, and contended that the arrestments and conveyance by the pursuer and the Edinburgh and Glasgow Bank in favour of the North of Scotland Bank embraced every estate which belonged to the pursuer, and was intended to do so, and that, having already accounted to the assignee, they could not be called on to any extent whatever to account again to the pursuer.

The Court, however, having regard to the fact that the diligence had been granted *before answer*, and considering that, if there has been no other estate intromitted with, there can be no accounts, and that it is not generally expedient to interfere with an investigation nor anticipate the result until the documents, if any, shall have been seen and considered, unanimously adhered to the Lord Ordinary's interlocutor.

M'MILLAN v. THE FREE CHURCH OF SCOTLAND.—July 9.

Reparation—Society—Title to Sue.

This case, the circumstances of which are well known, was this day advised. The following are the issues as reported to the Inner House:—

- ‘1. Whether, according to the contract of association or constitution of the Free Church of Scotland, a deliverance of any of the Presbyteries on charges preferred against any of the ministers of the Free Church of Scotland cannot, except in so far as appealed or complained against, be altered by the said General Assembly; and then only after hearing parties, or allowing them an opportunity of being heard: And whether the defenders, the General Assembly of the Free Church of Scotland, at their meeting in Edinburgh in May 1858, wrongously, and in violation of said contract of association or constitution, without hearing the pursuer, or giving him an opportunity of being heard, and without the requisite appeal or complaint, altered a deliverance of the Presbytery of Dumbarton, dated on or about the 1st April 1858, and suspended the pursuer from his office as a minister of said Church, to his loss, injury, and damage?’

Damages laid at L.500.

The second issue, which has reference to the sentence of deposition, puts the question—

- ‘Whether, according to the contract of association or constitution of the Free Church, it is beyond the power of the General Assembly of that Church to depose any of its ministers, without his being charged with crime or offence, until after hearing, or allowing him an opportunity of being heard, in his defence: And whether, on or about 1st June 1858, the defenders, the General Assembly of the Free Church of Scotland, and the defenders, the Reverend Dr Alexander Beith, the Reverend Dr Robert Smith Candlish, and the Reverend Dr James Bannerman, or any of them, without any crime or offence

having been charged against the pursuer, without finding him guilty of any crime or offence, and without having heard, or allowed him an opportunity of being heard, wrongously, and in violation of said contract of association or constitution, deposed the pursuer from his office as a minister of the said Church, to his loss, injury, and damage?'

Damages laid at L.3000.

The judgment of the Court dismissing the action was founded chiefly on the ground that the officials of the Free Church Assembly, who had been called as representing that body, did not in point of law represent it, as religious societies are not entitled to the privileges either of corporations or of trading companies. There was no conclusion against individual members for damages in the first action; and the pursuer had intimated his intention not to proceed with the second action alone.

THE SHAW'S WATER JOINT-STOCK COMPANY v. THE GREENOCK POLICE TRUSTEES.—*July 10.*

Assessment—Liability—Construction of Clause.

The pursuers were incorporated in 1825 by the Act 6 Geo. IV., cap. 120, as a company for the purpose of collecting the Shaws water, and applying the same to the driving of mills and machinery near the town of Greenock, and for supplying that town and its harbour with water. The company has from time to time fenced out pieces of ground for the erection of mills, to be driven by water-power, and bound itself by the feu-contracts to supply water-power. In respect of these rights, the feuars, by said contracts, are taken bound to pay the company certain annual duties for the ground and water-power. The present action was brought for declarator that the pursuers were not liable to be assessed by the defenders under the Greenock Police Act, 3 Vict., cap. 27, in respect of the feu-duties and water-rates. The defenders maintained that the pursuers were liable to be assessed for the duties payable to them for the use of the water. The pursuers maintained that the Act only authorized assessments upon 'tenants and other occupiers or possessors of dwelling-houses, warehouses, vaults, shops, cellars, stables, breweries, manufactories, yards, mills, and other erections, tenements, properties, or possessions, and any premises of whatever description or denomination the same be,' and that this description did not include water-power, and that the only parties who could be charged for it were the occupants of the mills who used it, under the 51st section of the Act.

The Lord Ordinary (Ardmillan) held that the Water Company were liable to be charged for what benefit they derived by supplying the millers with water, as this was a beneficial use of their own property, the water-works. The pursuers having reclaimed, the Court altered; holding that the parties liable to be assessed as occupants of the water-power were the tenants of the mills, and that the Act did not authorize the assessment to be levied twice for the same subject.

M.P., SIR JOHN CAMPBELL'S TRUSTEES v. LADY CAMPBELL AND OTHERS.—*July 11.*

Marriage-Contract Provision—Revocation—Codicil.

This case refers to the distribution of the estate of the late Sir John Campbell, who was killed at the attack on the Redan in 1855. Three

deeds were founded upon by the several claimants,—the ante-nuptial contract of marriage; a Scotch trust deed, executed by Sir John in 1849; and a last will and testament, executed in the English form shortly before the testator left for the Crimea. By the ante-nuptial contract Sir John bound himself not only to give the child or children of the marriage proper and careful education, but to provide also, in a manner suitable to his station, means for their establishment in the world, and at least in proportion to the provision made for them by Lady Campbell. It was pleaded by the younger children of the marriage, and by the marriage-contract trustees, that this was a distinct and intelligible provision on their behalf, capable of being implemented, and forming a burden upon the estate. On the other hand, Lady Campbell contended that the obligation was only intended to continue during Sir John's life, and that, at all events, it was void by uncertainty. The Lord Ordinary held that the obligation was extremely vague and indefinite; that 'it might have been intended to apply only to such exigencies as might have arisen during Sir John's life;' and as the children had been found entitled to legitim (in a previous interlocutor it had been found that, at his death, Sir John's domicile was Scotch), he saw no ground for sustaining their claim to any further special provision.

Another question was raised by the present Sir Archibald, who contended that the English will was ineffectual to carry the Scotch heritage, which consequently descended to him as heir-at-law—the Scotch trust deed having been revoked, even as to the Scotch heritage, by the subsequent English will. The cases of *Leith v. Leith's Trustees* and of *Purvis v. Purvis* were held to support this view. The Lord Ordinary was of opinion that the English will did not revoke the Scotch trust deed; but that, as the Scotch heritage had been conveyed to the trustees with a declaration of the purposes to which it was to be applied, and a power to declare any other purposes by will, or by any writing clearly expressing the testator's intention, the last will might be read as a good direction to the trustees regarding the disposal of the heritage. After hearing parties last summer upon these points, the Court ordered written argument, and cases for the different claimants were lodged during the winter session. The case was now advised, and the interlocutor of the Lord Ordinary was substantially adhered to.

Adm., GARDNER AND CO. AND OTHERS *v.* HAY.—*July 11.*

Joint Adventure—Liability.

The respondent, Thomas Hay, brought an action against the advocates in the Sheriff Court of Glasgow, for payment of various accounts incurred to himself and other tradesmen (whose assignee he was), for materials and work furnished in connection with the building of certain properties in Glasgow. In April 1856, William Gardner, builder, Glasgow, being an undischarged bankrupt, and carrying on business under the name of William Gardner and Co., feued certain ground in Scotia Street and Shamrock Street, Glasgow, and had proceeded so far with the erection of buildings on the ground, when, in July 1856, he applied to Messrs Livingston and Gardner, writers, Glasgow, to raise a loan of money for him on the security of the ground and buildings. No feudal title to the ground having hitherto been taken by W. Gardner, it was arranged that,

as he was an undischarged bankrupt, the title should be taken to Mr Robert Gardner, one of the partners of Livingston and Gardner, which was done, and a loan obtained. The buildings were then further proceeded with; and Livingston and Gardner disbursed out of the loan the money required from time to time to pay wages and tradesmen's accounts. W. Gardner had previously a contract with certain parties for putting up the mason work of certain tenements at Hillhead, Glasgow, and Livingston and Gardner; and, on the other hand, these parties did work on the Scotia and Shamrock Street properties. Livingston and Gardner, in settling with these parties, set off the accounts due to Gardner and Co. with the accounts owing by Gardner and Co. to these other parties. The pursuer, and the other tradesmen whose accounts are assigned to him, furnished work and materials to the properties both in Scotia and Shamrock Streets and Hillhead (in the latter case in connection with Gardner and Co.'s contract); and it appeared that, in doing so, they relied on the credit of W. Gardner alone as an individual, not knowing that he was in partnership with any one. Payment of the accounts, however, was demanded from Livingston and Gardner, as partners of W. Gardner, or his firm of Gardner and Co., in a joint adventure having reference to the building speculation in Scotia and Shamrock Streets and Hillhead; and the action in the Sheriff Court was brought against Gardner and Co. and Livingston and Gardner, and the individual partners of each of these firms, as partners in the alleged joint adventure.' The Sheriff-substitute and Sheriff-principal, after proof, decided against the advocators, holding that a joint adventure had been established.

On the case being advised, the Court adhered, except as to the Hillhead contract, to which they considered the joint adventure did not extend.

M'GIBBON AND OTHERS *v.* THE OFFICERS OF STATE AND THE LORD ADVOCATE.—*July 16.*

Teinds—Valuation.

The question which we report in this case arose incidentally in a process of disjunction and erection at the instance of the trustees of the church of Ardoch, praying for the disjunction of certain portions of land from three parishes, and their erection into one new parish, to be called the parish of Ardoch.

The Officers of State were called as representing the Crown, as patron and titular of two of the said parishes, and gave in defences, in which they stated that they entertained great doubts whether there would be a sufficiency of free teind to afford a competent stipend to the minister, as, though the pursuers estimated it at L.263, 17s. 3d., it only amounted, according to their computation, founded upon the states of teinds in the localities of Dunblane and Muthill, which they assumed to be correct, to L.113, 2s. 4d. The pursuers having afterwards, however, in a rectified state, brought out a free teind of L.132, the defenders withdrew their opposition, and the Court, on 21st February 1855, decerned in the disjunction and erection, and on March 7, 1855, modified a stipend to the minister of 12½ chalders of victual (half meal, half barley), with L.5 for communion elements, and remitted to the Lord Ordinary to prepare a locality; and his Lordship, on 19th December 1857, remitted to the Teind Clerk to prepare a scheme of locality, and to report.

Before the Teind Clerk could prepare such a scheme, he required to make out a state of the teinds of the new parish, and, in doing so, treated the teinds of Balhaldies as unvalued, for the reasons stated by him in a note in the following terms:—‘*N.B.*—In last process of locality, Mr M’Gregor condescended on a decree of valuation, said to be dated 4th February 1643, as containing a valuation of the teinds of Balhaldie. The decree is not on record, and, besides, it does not appear to be a good decret, so far as the minister is concerned. From what is stated in Mr M’Gregor’s condescendence, it appears to have been a decree merely ratifying an agreement between the tacksman of the teinds, and the heritor of the lands for the time being, and to which the minister was no party. It is not a good decree, even against the titular, a tacksman having no right to lead a valuation, particularly of bishops’ teinds.’

The Court, affirming Lord Kinloch’s decree, found that the objectors had not produced a valid decree of valuation.

GOWAN’S TRUSTEES *v.* CARSTAIRS.—*July 18.*

Lease—Obligation.

This was an action brought to have it found and declared, that the defender was bound to execute a long lease for 999 years in favour of the pursuers, of a field of seven acres, belonging to the defender. The pursuers aver that an agreement to grant such a lease was entered into between their author and the defender in 1851; and that on the faith of that agreement certain improvements were made and executed by the pursuers’ author on the field, and certain receipts were granted for the feu-duty or rent, which, if proved, would support the pursuers’ contention. On the other hand, the defender said the park was let to the pursuers’ author from year to year. The Court decided that the agreement not being in writing, the pursuers could not be allowed a proof *prout de jure*, and dismissed the action.

Pet., MRS FORSYTH.—*July 20.*

Insanity—Recal of Curatory.

This petitioner had a curator appointed to take charge of her affairs in 1858, during which year she had manifested delusion in reference to a bond of annuity granted by her deceased husband in favour of his brother. She maintained that she had seen a vision of her deceased husband, and been informed by him that the bond was forged. The annuitant is dead, and the lady has petitioned for a recal of the curatory, and produced a medical certificate that she is sane. The Court remitted to Drs Christison and Smith to examine and report, and they reported at length that the petitioner still believed that her dead husband had appeared to her, and that the forgery of the bond was proved by the vision; but that as the annuitant was dead, this delusion was now inoperative, and that she was intelligent and rational on other matters, and might be trusted to take care of her property. Her daughters were called as respondents; but they did not oppose the recal of the curatory. She has quarrelled with them because of it, and was living separate from them.

The Court took time to consider, and to-day, at advising, the Court (Lord Deas dissenting) recalled the curatory, on the ground that this

lady's property now ran no risk of dilapidation from the subsistence of the delusion as to the vision, and because many persons who could manage their affairs, and even grow rich, were subject to delusions.

SECOND DIVISION.

R. N., J. G. GLASSFORD v. BORTHWICK (H. GLASSFORD'S TRUSTEE).—
June 21.

Process—Contingency—Entail.

The late Henry Glassford of Dougalston was sequestrated in 1838, and Mr Archd. Borthwick was appointed trustee on his estate. Mr Glassford's estates were entailed; and Mr Borthwick, upon the bankrupt's death, in February 1860, made up a title to them in terms of the 'Titles to Lands (Scotland) Act, 1858.' In November 1860 he instituted an action for the purpose of declaring that the entail was bad, and that the estates embraced in it belonged to the bankrupt in fee-simple, and therefore now belong to his creditors. The action was directed against J. G. Glassford, the bankrupt's eldest son, and the other substitute heirs of entail. The Lord Ordinary held that the entail was valid, and assoilzied the defenders. Against this interlocutor Mr Borthwick reclaimed to the First Division, and the case is now on the long roll of that Division. Mr J. G. Glassford, on his father's death, made up a title to the entailed estate, and in March last he presented a petition for its disentail. To this petition Mr Borthwick put in answers, and craved that the petition should be sisted till the issue of the action of declarator. The Lord Ordinary granted the sist; and against this Mr J. G. Glassford reclaimed to the Second Division, for which Division the petition was marked. On a reclaiming note, the Court were of opinion that there was no contingency between the petition for disentail and the action of declarator. It was true they both related to the same entailed estate, but there was no connection whatever between the questions in regard to it raised in them. No doubt, if Mr Borthwick succeeded in the declarator, that would render the proceedings in the petition for disentail abortive, but that was no ground of contingency. Their Lordships therefore refused the motion for a remit. Their Lordships were also of opinion that there were no grounds whatever for the sist. Though the petition for disentail went on to decree, that could do the trustee no harm. He was sufficiently protected by the litigiousness created by the action of declarator, and he could still further protect himself by inhibition. To the petitioner, on the other hand, any delay might be most serious. He might himself die, or some of the consenters might die, and it might become quite impossible to go on with the petition. The Court therefore recalled the interlocutor, with expenses.

SOMERVILLE v. ROWBOTHAM AND OTHERS, MANAGERS OF THE NORTH BRITISH RAILWAY INSURANCE SOCIETY.—June 27.

Title to Sue—Society—Insurance.

This is an action by the representatives of a stoker in the employment of the North British Railway, who lost his life by an accident. He was a member of a society which was composed of all *employés* of the railway

who should contribute a certain sum, and the object of which was to administer pecuniary relief in all cases of death, or temporary or permanent disablement, arising from accident occurring whilst in the discharge of duty. The rules of the Society provide that the affairs of the Society shall be under the management of a committee composed of not exceeding sixteen members, either honorary or ordinary, to be nominated at a general meeting of the members. The representatives of the deceased having made a claim against the Society, and the Society having refused to sustain it, the present action was brought. The summons is directed against sixteen individuals, as 'members of the Committee of Management of the North British Railway Insurance Society, for themselves, and as representing the said Society.'

The defenders pleaded, *inter alia*,—1. The North British Railway Insurance Society not being incorporated nor registered, the defenders cannot be sued as representing the said Society; and, 2. All parties having an interest are not called as defenders.

The Lord Ordinary (Ormidale) sustained the first plea, holding that the present action was incompetently directed against the persons who are said to be the Committee of Management, the association being of the nature of a friendly society, but not brought under or entitled to the benefit of the Friendly Societies Act. His Lordship could discover nothing in the printed rules to the effect that the Committee of Management were entitled to sue or be sued on behalf of the Society.

The Court recalled the Lord Ordinary's interlocutor, and sustained the action as laid against the Managing Committee, on condition that the pursuer should call any members of the committee who might have been omitted by a supplementary summons.

In delivering judgment, Lord Neaves observed, that this case involved an important question as to the mode of enforcing claims arising *ex contractu* against private associations. The association here was not a trading company; and the rules in reference to trading companies were, therefore, not applicable. Such an association was not a separate person in the eye of law in the same way as a trading firm. In regard to such an association, it was not necessary to sist or convene it *eo nomine* by the title which it assumed. It was, therefore, necessary to inquire in what form the individuals forming this association should be called. In every case this must depend upon two considerations;—1. The nature of the association; and, 2. The nature of the contract out of which the obligation sued for had arisen. In some cases, it might be easy and proper to call all the individuals composing an association; in others, the difficulty of calling all the members might amount to a practical impossibility; and a rule requiring all to be called would amount to a denial of justice. In this body, consisting of all the persons in the service of the railway company who might choose to contribute—in so fluctuating a body it was exceedingly difficult to convene all the members together. The question here was, not how the Society might sue, but how they might be sued. There might be cases—as, for instance, where furnishings were made to the association, on the order of their officers; and his Lordship could not think that the party so furnishing was bound to call more than the officers of the association with whom the contract had been made, as representing the unknown, undisclosed, and practically inaccessible association.

CHRISTIE v. RUXTON.—June 27.

Right in Security—Deposit of Titles.

This is an action for recovery of title-deeds at the instance of the present proprietor of the lands. The defender pleads a right to retain them in virtue of his hypothec as law agent, and also in respect of an agreement with a previous proprietor that he should be entitled to retain them in security of certain cash advances.

The Lord Ordinary (Neaves) sustained his right of hypothec as law agent, but found that the titles were not liable to be retained in security of the cash advances or loans. He held that, upon correct legal principles, the titles of an estate were accessories of the estate itself, and were incapable of becoming a proper subject of pledge by deposition. Whatever plea might sometimes arise by way of personal exception against the party himself who deposited the deeds, no real right thence arose against another party who, as proprietor of the lands, came also truly to be the proprietor of the titles. An exception to this general rule had, for reasons of expediency, been introduced in the case of a writer's hypothec; but that privilege, which is of an anomalous kind, ought not to be extended to other transactions, and afforded no proper analogy to aid a claim upon an alleged impignoration for cash advances, or pecuniary obligations generally. The Court adhered;—Lord Benholme observing that by law it was incompetent to impignorate title-deeds or documents of debt so as to give the depositary a right to retain them against the party who had become owner of the land or debt by onerous conveyance. This flowed from the principle that title-deeds and documents of debt were *extra commercium*—they had no intrinsic worth, and were valuable only as connected with the land or debt, their only value to the holder being the inconvenience to which he could put the owner of the subject by depriving him of the evidence of his right, and thus compelling payment of the claim in security of which they were held. Such an anomalous right had been recognised by law in writers' hypothec, but had never been extended further. The Lord Ordinary's judgment was supported by principle, and by the authorities.

Appeal, N. C. DUFF v. THE TRUSTEE ON HIS SEQUESTERED ESTATE.—
June 28.

N. C. Duff, a sequestrated bankrupt, having offered a composition of 4s. per pound, on the understanding that he was to have personal protection till the offer was decided on, and that in the meantime no further expenses should be incurred in the sequestration, except such as were unavoidable, the offer was accepted by all the creditors present at the meeting for considering it, with the exception of Mr James Bell, S.S.C., for himself, and as mandatory for another creditor. Mr Bell protested and appealed to the Sheriff, on the alleged grounds, *inter alia*, that the bankrupt had been guilty of fraudulent conduct, and that the trustee had failed in his duty of expiscating the affairs of the estate, and of reporting the fraudulent conduct of the bankrupt. The Sheriff of Edinburghshire remitted the proceedings to the accountant of bankruptcy, and on his report pronounced the following interlocutor:—

' *Edinburgh, 4th June 1862,—Present*, Mr Latta, the trustee, along with

Mr G. H. Pattison, advocate, for the trustee, as representing the general body of creditors, and as instructed by the commissioners on the estate; also Mr Mason, S.S.C., agent in the sequestration; and Mr James Bell, S.S.C., a creditor.—The Sheriff having resumed consideration of the whole proceedings, along with the report by the accountant in bankruptcy, of date 3d June 1862, and having heard Mr Bell, a creditor, for his interest, and counsel for the trustee and general body of creditors—Finds, for the reasons stated in the note subjoined, that the offer of composition made by the bankrupt, Neil Campbell Duff, is not duly made, and is not reasonable, and therefore refuses to sustain the said offer: Finds Mr Bell entitled to the expenses of his opposition to the offer of composition; allows an account thereof to be lodged, and remits the same to the auditor of Court to tax and report: Finds it unnecessary, in the circumstances, to consider any other appeal, and decerns; and appoints the Clerk of Court to transmit a copy of this interlocutor and note to the accountant in bankruptcy.

(Signed) ‘JOHN T. GORDON.’

To this interlocutor, the Court, on appeal, adhered, holding that the Sheriff had a duty cast upon him to see that the offer of composition was just and reasonable; and was not bound to assent to the wishes of a majority of creditors.

TRODDEN v. SWEETMAN.—July 2.

Process—Mandatory—Prorogation.

This case was tried at the March sittings. The jury returned a special verdict on the first issue, and a verdict for the pursuer on the second. Shortly after the trial the defender's mandatory, Mr R. K. Barbour, writer, Saltcoats, was sequestrated. When the Court met in May, the pursuer moved that the defender should be ordained to sist a new mandatory. On 31st May he was ordered to do so in fourteen days. On 17th June the time allowed was prorogated for fourteen days further.

To-day the pursuer moved for decree, in terms of the summons, against the defender in respect of his failure to comply with the order of the Court. It was stated for the defender, who is the captain of a smack, that he had sailed upwards of a month ago from Liverpool, his destination being a port on the west coast of Ireland. Several letters were read from a special messenger who had been sent to Ireland to await the defender's arrival, and who has been waiting there for the last three or four weeks, complaining very much of the state of the weather there, and that ‘there is still no word of Sweetman.’

The Court, in the special circumstances, superseded consideration of the motion for eight days, but intimated that the defender would not be allowed to put the pursuer over the session.

AMELIE JORDON OR ROBERTSON AND OTHERS v. JOHN ADAMSON.—July 3.

Reparation—Master and Servant.

This was an action of damages raised at the instance of a widow and her children, on account of the death of the husband, caused, as was alleged, by the fault of the defender. The deceased, Neil Robertson, had been for nearly twenty years in the employment of the defender, who is the proprietor of the Erichside Works, near Blairgowrie. In the de-

fender's works there is a road leading therefrom to Blairgowrie, along which the workmen, in leaving the works or in going to them, had to pass. A part of the road consisted of a small bridge or platform thrown across a by-lade or wash flowing through the works. This bridge was not fenced on either side. On the night of 3d January 1859, Robertson, having left his work as usual in the evening, went along this road, and the night being very dark, and the road and bridge unlighted, he fell over the side of the bridge, and the injuries he thus received resulted in his death on the following day. On the adjustment of the issues in the Outer House, it was objected to the pursuer's getting an issue, that the action was irrelevant. The Lord Ordinary reported the proposed issue to the Court, and the case was heard on that report to-day.

It was maintained for the defender that there was no case to go to a jury. The deceased had known of the condition of the bridge all the time during which he was the servant of the defender, and that if he had apprehended danger he should have left the work. It was further maintained, that there was no liability on the part of the master for damages arising from such an event as that which resulted in Robertson's death.

The Court, by a majority (Lord Cowan dissenting), dismissed the action. *Per* the Lord Justice-Clerk—There was no authority whatever, either at common law or under the special relation of master and servant, for rendering a master liable for injuries sustained by one of his workmen who fell over an unfenced and unlighted bridge on his premises. The deceased knew the state of the bridge well; and if he thought it dangerous, he ought to have given up his employment. This was not the case of a bridge uncommonly or extraordinarily dangerous; and if liability in the present case, as contended for by the pursuers, was to be sustained, it would lead to most serious consequences.

COCHRANE v. PAUL.—July 9.

Lis Alibi—Obligation—Account.

In the month of March 1855, the suspender, Mr William Marshall Cochrane, was charged to make payment to Mr Thomson Paul of two sums of L.470, 17s. 7d. and L.216, 5s. 2d., with interest from Martinmas 1846. These sums were contained in two personal bonds, dated respectively 21st August 1841 and 27th May 1846, granted by the suspender and his father, the Hon. Major William Erskine Cochrane, then of Eddlewood, in Lanarkshire, in favour of Mr Paul. Soon after the last bond was granted the suspender and his father went to reside in England, and Mr Paul, in the year 1850, raised an action in the Court of Queen's Bench against the suspender's father for payment of the sums contained in the bonds. This action was met by a bill in Chancery, at the instance of Major Cochrane against Mr Paul, calling for a general accounting between the parties, and no further proceedings appear to have been taken in England. In March 1855 the suspender came to Scotland, and having been charged to make payment of the sums contained in the bonds in question, he brought the present suspensions, in which he stated various pleas of *lis alibi pendens* and others, with reference to the English actions. These pleas were all repelled in the year 1857, and the case was then sent back to the Outer House for disposal of the suspender's only remaining plea, to the effect that the question, whether or not the bonds had been

paid, depended on a general accounting between Mr Paul and Major Cochrane.

On 20th July 1861, Lord Neaves (Ordinary) found that the bonds in question had been extinguished; and he therefore suspended the charge *simpliciter*, and found Mr Paul liable in expenses. On a reclaiming note to the Second Division, this interlocutor was recalled. The interlocutor of the Lord Ordinary and the arguments of parties turned entirely upon the construction of two letters which passed between Major Cochrane and Mr Paul in September 1846, with reference to the sale of Annsfield, then belonging to Major Cochrane, and over which Mr Paul held certain securities.

Pet., ALEXANDER.—July 15.

Judicial Factor—Discharge.

On November 28, 1856, James Alexander, writer in Glasgow, was appointed judicial factor on the estate of the late John Boyle Gray, writer in Glasgow. The petition for the appointment of the judicial factor was made in virtue of the provisions of the Bankruptcy (Scotland) Act, 1856. The judicial factor, in compliance with the 11th section of the Act of Sederunt of 25th November 1857, lodged with the accountant an inventory of the estate, a state of debts and claims, and a vidimus of the estate—which inventory was adjusted and approved of by the accountant in bankruptcy. It appears from this vidimus of the estate that the assets are much more than sufficient to pay the debts due and the legacies or provisions bequeathed by the deceased, and in point of fact the debts and legacies have all been paid by the judicial factor.

The judicial factor accordingly lodged with the accountant a final state of funds and scheme of division, at the close of which the judicial factor pronounced a deliverance, ranking and preferring certain persons to the whole residue of the estate. The accountant in bankruptcy brought the matter by report under the notice of the Court.

After the accountant's report the present petition was presented, praying the Court to approve of the final state of funds and scheme of division prepared by the judicial factor, and to authorize him to deliver or pay over the residue as therein proposed. The Junior Lord Ordinary (Ormisdale), before whom the petition came, reported the case to the Court, and counsel were heard.

The Lord Justice-Clerk said, the officer appointed under the 164th section of the Bankruptcy Act was just a judicial factor. Perhaps his powers were greater than, but they were exactly of the same kind with, those of ordinary judicial factors appointed by the Court. There was nothing in the section to exclude the appointment of a judicial factor, though there were no debts affecting the estate at all. That being the case, it was a strong thing to say that the petitioner should be discharged on different terms from other judicial factors, or without an inquiry as to his management. The first thing was for the judicial factor to report to the accountant in bankruptcy the scheme of division which he would suggest. The factor must not divide at his own hand. The accountant in bankruptcy would then report to the Lord Ordinary, who would have power to sanction the scheme of division, and on its being carried out to discharge the factor.

Lords Cowan, Benholme, and Neaves concurred.

GOLLAN *v.* GOLLAN.—*July 18.**Writ—Erasure—Entail.*

In the deed of entail of the lands of Gollanfield, there are several erasures not mentioned in the testing clause. Two of these have been founded on by the pursuer as *in essentialibus*, and fatal to the deed, and he therefore seeks to set it aside. The others have not been treated as important.

The pleas urged by the pursuer are founded on the erasure in the clause prohibiting alteration in the order of succession, and on the erasure in the irritant clause.

The prohibition to alter the order of succession is as follows:—‘It shall be nowise lawful to nor in the power of the said John Gollan or any of the said heirs of entail and substitutes before mentioned (to inn) ovate, alter, or infringe this present tailzie or any of the conditions thereof, or the order of succession hereby established.’ The word ‘to,’ or greater part of it, and the letters ‘inn,’ are written on an erasure.

The portion of the irritant clause objected to is as follows:—‘And it is hereby expressly provided and declared that all the debts or deeds of the said John Gollan (or of any of) the said heirs or substitutes of tailzie, contracted, made or granted as well before as after their succession to the said lands,’ etc. The words ‘or any of’ are written on an erasure.

The Lord Ordinary (Ardmillan) expressed his view of the law of erasures thus:—‘The letters or the words written on such an erasure, being presumed to have been superinduced after subscription, and being thus without authentication, are held not to have been written. If the letters written on such an erasure are essential to the word, the word is held not to be there. If the word is essential to the clause, the clause is held not to be there. If the clause is essential to the deed, the deed is null and void. The deed is improbativ to the extent of the erasure, and is null and void in so far as the erasure is *in essentialibus*.’

But his Lordship held that in neither of the instances were the letters or words erased *in essentialibus* of the clause or of the deed, and he therefore assoilzied the defenders, the substitute heirs. The pursuer reclaimed, and the Court altered the judgment and reduced the entail, on the ground that, unless the irritancy was directed against the institute and *all* the substitutes, it was not a good irritant clause. The word ‘*any*’ was essential to it, and that word was written on an erasure. The objection to the irritant clause was therefore a fatal objection.

HIGH COURT OF JUSTICIARY.

Monday, June 30.

(Before the LORD JUSTICE-GENERAL, LORDS NEAVES and JERVISWOODE.)

*Susp. and Lib., DAVID FERGUSON v. DAVID THOM.**Masters and Servants Act—Hard Labour.*

The suspender in this case had been farm servant in the employment of the respondent, and he sought suspension of a sentence, dated Nov. 19, 1861, whereby George Lyon, Esq., J. P. for the county of Forfar, convicted him, under the Masters and Servants Act (4 Geo. IV., c. 34), of having absented himself from his master’s service before the completion of the term of his contract, and granted warrant for his imprisonment in

the prison of Forfar for fourteen days ; and further, abated from his wages the sum of 5s., being a proportional part of his wages during the period of imprisonment.

The suspender pleaded that the duration of the contract specified in the petition was different from that found to be proved by the Justice ; and that under the statute the sentence was invalid unless it included 'hard labour.'

The Lord President—I think that the first objection is not well founded, but that the second should be sustained. It appears to me that the enactment in the clause referred to is not complete till you come to the provision regarding hard labour. It is no good answer that this particular prisoner has no reason to complain of the non-fulfilment of that provision. The duty of the Justices is to walk according to the statute, which imposes one kind of punishment, and does not leave it open to them to dispense with the hard labour. This sentence, not having been in conformity with the statute, must therefore be suspended.

Lord Neaves—I concur on both points. I think it is of the essence of the imprisonment under the statute that it is to be accompanied with hard labour. The statute has in view the benefit of working men, and it is of vital importance to them that the term of imprisonment should be short. It is therefore not to exceed three months. But it is of equal importance that their habits of industry and their bodily strength should be kept up while they are in prison ; and therefore there is the provision, that while there, they are 'to be held at hard labour.' If that provision were alternative, there would be a temptation to Justices to dilute the character of the imprisonment by omitting the hard labour and extending the term of the imprisonment, the consequences of which would be much worse for those subjected to it.

Lord Jerviswoode concurred.

In consideration that the respondent had been put to unnecessary expense by the suspender in resisting pleas that were not sustained, the latter was allowed only the expenses of printing the bill of suspension and his additional plea in law.

SNADDON v. SPENCE.

Day Poaching Act—Expenses of Complaint.

This was a suspension of a conviction obtained under 2 & 3 Will. IV., cap. 68 (the Day Trespass Act), in the Justice of Peace Court of Clackmannanshire, and of a judgment of the Quarter Sessions of that county, by which the said conviction was affirmed, and the appeal against it dismissed. The complaint in which the proceedings under suspension originated was presented by the respondent as Procurator-Fiscal to the Justices of the Peace of Clackmannanshire, and charged the suspender, who is a surfaceman in the employment of the Stirling and Dunfermline Railway, with the offence mentioned in section 1 of the statute, inasmuch as he had committed a trespass in pursuit of game on the lands of the railway company, in the daytime, on 4th November 1861.

The leading reasons of suspension were:—(1.) That the respondent, as Procurator-Fiscal to the Justices of the county, was not entitled to prosecute for the offences in question. (2.) That in the complaint the suspen-

der was not relevantly charged with that offence. (3.) That the limits of the statutory daytime, as specified in sec. 3 of the statute, were not set forth in the complaint. (4.) That the proprietors of the land upon which the alleged trespass took place were not mentioned in the complaint. (5.) That the oath upon which the prosecution proceeded was not in conformity with the requirements of the statute. (6.) That the suspender was not guilty of trespass under the statute, inasmuch as he had entered and was upon the line of the railway, in the discharge of his duties as surfaceman, at the time when the trespass was alleged to have been committed. (7.) That the party upon whose oath the suspender had been charged with the statutory offence was not the owner nor the occupier of the land in question, nor in the service of either. (8.) That the conviction did not specify the particular day on which the alleged trespass was committed. The conviction was written upon the same sheet of paper with the complaint, and bore that the suspender had been found guilty of committing the offence "day within mentioned;" the day in question was stated in the complaint. And (9.) that the judgment of the Quarter Sessions affirming the conviction, besides ordering and adjudging that the suspender should be dealt with and punished according to the conviction, further ordered and adjudged that he should be imprisoned for three weeks, failing payment of the expenses of the appeal within four days.

The Court repelled all these reasons of suspension except the last, which they sustained on the ground that the Justices sitting in Quarter Sessions had no authority to award imprisonment as a means of enforcing payment of the expenses of the appeal. The judgment of the Quarter Sessions was therefore suspended in so far as it ordered the suspender to be imprisoned in default of payment of these expenses; but it was held that the portion of the judgment so suspended was separable from the rest, and accordingly the affirmance of the conviction, as well as the conviction itself, was allowed to stand.

MINTY v. SYMON.

General Police Act—Assault.

The suspender is a stoneware merchant in Banff. He seeks to suspend a sentence of the Magistrates of Macduff on various grounds, alleging that they convicted him of assault without evidence, and were actuated by malice, his sole offence being an attempt to turn a drunk hawker to his door. The ground to which the Court attached most importance is thus set forth in the pleadings:—"The alleged Magistrates pronounced the following sentence:—"Macduff, 2d May 1862.—The judges find the complaint relevant and proven, and therefore fine and amerciate the said James Minty in the sum of five shillings, and failing immediate payment thereof, ordain and decern the said James Minty to be imprisoned in the prison of Banff for the period of six days from this date, and on expiry thereof, ordain him to be set at liberty, and for that purpose grant warrant to constables of Court to convey him to, and to the keeper of the prison of Banff, to detain him therein accordingly, and decern. (Signed) ISAAC CRUICKSHANK, ALEXANDER DALLAS, WILLIAM ANDERSON." This sentence is illegal, and at variance with sections 337 and 361 of the General Police Act, as after quoted, because its terms are such as could or did not admit of the liberation of the complainer from prison during the period of im-

prisonment prescribed, unless immediate payment of the fine was made so soon as the sentence was pronounced, whereas the Magistrates were only entitled, by said sections of the Act, to pronounce a warrant "for imprisoning him until such damages or penalty and expenses shall be paid." The sections of the said Act above referred to are in the following terms: Section 337 enacting, *inter alia*, "It shall be lawful to such Magistrate or Sheriff to proceed to the hearing of the complaint, and upon proof either by the confession or admission of the party complained against, or upon the oath of one credible witness, or more, and without any written pleadings or record of evidence, to convict or give judgment against the party complained against, and thereupon to decree, adjudge, and sentence him to pay the damages or penalty which have arisen or been incurred, and the expenses attending the proceedings; and to grant a warrant for imprisoning him until such damages or penalty and expenses shall be paid." Section 361 enacts, "That in case any pecuniary penalty authorized by this Act shall not be immediately paid or consigned in manner after mentioned, it shall be lawful to sentence the person found liable in the same to be imprisoned till such penalty be paid, but in no case shall the period of imprisonment exceed thirty days."

The Court held that neither of these two sections applied, in respect that a fine for assault is not a 'pecuniary penalty' of the nature referred to in the last quoted section, and that the sentence pronounced was competent under the common law jurisdiction conferred on the Magistrates by the 345th section of the General Police Act, and refused the suspension.

English Cases.

CARRIERS.—Plaintiff delivered to defendants, a railway company, a dog to be carried, and signed a ticket containing the following terms: 'Received the annexed ticket subject to the following conditions: The company will not be liable in any case for loss or damage to any horse or other animal above the value of L.40, or any dog above the value of L.5, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value declared. The company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed L.40, or any dog L.5, the price of conveyance will, in addition to the regular fare, be after the rate of L.2, 10s. per cent. upon the declared value above L.40, whatever may be the amount of such value, and for whatever distance the animal is to be carried.' The value of the dog was L.21, but plaintiff made no declaration of its value, and paid only the regular fare, 3s. The dog escaped from the train during the journey, without any neglect or default on the part of the company. Plaintiff having sued the company for the loss, it was held, in the Court of Exchequer Chamber (*dissentiente* Wilde, B.), reversing the judgment below, that plaintiff was not entitled to recover, Erle, C. J., and Keating, J., being of opinion that section 7 of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict., c. 31, was confined in its application to cases where the loss or injury was occasioned by the neglect or default of the company, and had no bearing in a case where the

loss arose from pure accident. Erle, C. J.: The history of the section, as contained in all the judgments, from *Johnson v. The Midland Railway Company* (4) and *Simons v. The Great Western Railway Company* (5) downwards, shows that the Legislature, by the words 'loss occasioned by the neglect or default of the company,' meant, occasioned by culpable conduct, and not a mere failure to deliver occasioned by inevitable accident without any blame. All the judges have agreed that the Legislature interfered on account of the interpretation put by the Courts on certain conditions imposed by railway companies on customers in relation to the carriage of live animals, to the effect that the company would not be liable for any damage however incurred. Although in each case the company only sought to apply the condition reasonably, the Courts held that they claimed to be irresponsible for negligence, however gross, or misconduct, however flagrant—see *M'Manus v. The Lancashire and Yorkshire Railway Company* (6); and these decisions created a panic lest the companies should inflict wilful injury and claim immunity. The evil therefore to be remedied was, irresponsibility for negligence or other culpable conduct created by a condition, and the purpose of the Legislature was to apply a remedy for that evil.—(*Harrison v. The London, Brighton, and South Coast Railway Company*, 31 L. J., Q. B. 113.)

INJUNCTION.—The Court of Chancery will not grant an injunction to restrain the erection of a telegraph by a company upon a highway. A claim of unobstructed frontage to a high road must be established at law before the Court will grant an injunction to restrain any interference with the soil between the high road and the boundary fence of the landowner. The Master of the Rolls: Assume the fact to be as argued, that the soil in the private road belongs to the plaintiff, there is nothing at present which affects him with any injury whatever. It might have been originally by the erection of the posts in December 1860; but these have been taken down, and nothing has been done, except that certain pipes or mains have been placed in the soil underneath the public highway. I do not at this moment intend to express any opinion whether it is an invasion of his private rights or not, but I am clear that there is no loss of any irreparable description, or any particular injury to him, which requires the interposition of this Court prior to the hearing of the cause. Whether the Court will do anything upon the hearing of the cause is another matter; but by interlocutory injunction this Court only interferes to protect property, and even in that case, as was laid down in *Deere v. Guest* (1), where the injury has been completed, such as it is, then the Court does not interfere by way of injunction, but waits until after some proceedings at law, before, as a Court of equity, it will interfere.—(*The Attorney-General v. The United Kingdom Electric Telegraph Company (Limited)*, 31 L. J., Ch. p. 329.)

DEPOSITION.—There may be incidents to the state of pregnancy which render a woman too ill to travel. It is for the presiding judge at the trial to decide in his discretion whether the evidence that the witness is too ill to travel is sufficient.—(*The Queen v. Stephenson*, 31 L. J., M. Ca. 147.)

SHIP AND SHIPPING.—The plaintiffs, by a charter-party, agreed that their ship, the *Tiger*, which the defendant had selected for the purpose, should go to Hjerting, on the coast of Jutland, or so near thereto as she might safely get, to be there ready to load a cargo, by the 10th of April; and, being so loaded, to proceed therewith to London, where they were to deliver the same on being paid a lump sum for freight. The *Tiger* arrived alongside the jetty at Hjerting on the 10th of April, and there received the cargo from the defendant's agent, for which the master signed and delivered bills of lading. The *Tiger* afterwards left the jetty with such cargo on her voyage to London; but, owing to her draught of water, she was unable to pass, when loaded, over the inner bar, and returned, therefore, to the jetty, where she landed the greater part of her cargo on the 21st of April. The captain then proposed to defendant's agent to take on board from the jetty so much only of the cargo as the vessel could pass over the bar

with, and to receive the rest of the cargo outside the outer bar from lighters, in which it was to be brought to the vessel, at the defendant's risk and expense. This defendant's agent refused to do; and the *Tiger* thereupon left the jetty, and proceeded with only a small portion of the cargo to London. It was held, that the defendant having loaded the vessel with a cargo at the jetty, with the captain's consent, could not be required to load a second time, and that the plaintiffs were, under the circumstances, unable to sue either for freight or for damages arising from the defendant's refusal to re-ship the cargo.—(*The General Steam Navigation Co. v. Slipper*, 31 L. J., C. P. 185.)

APPEAL.—Where an appellant does not appear to support his appeal, it may be dismissed with costs.—(*Smith v. Durrant* (House of Lords), 31 L. J., Ch. 383.)

ANNUITY.—Testator gave his real and personal estate to trustees, and directed them to get in and sell his residuary personal estate which should not consist of leaseholds or monies invested on security, and to appropriate a sufficient portion for payment of an annuity, which on the marriage of his daughter he had agreed to pay. He then gave his trustees a discretionary authority as to the sale of his real and leasehold estate. The residuary estate was exhausted, but the real and leasehold estates were sufficient to answer the annuity, which had been regularly paid. In a creditors' suit by the annuitant asking for administration of the real and personal estate, and that provision might be made for payment of the annuity, it was held, the plaintiffs ought to have accepted an offer made to secure the annuity; that they were entitled to a charge on the testator's estates; that as the annuity had been paid, no ground existed for interfering with the authority of the trustees, but that a fund must be set apart to answer the annuity in the event of a sale of any part of the estates, with liberty to apply if the annuity fell into arrear. The Master of the Rolls: As in *Norman v. Johnson* (29 Beav. 77), I can now only declare that the annuity constitutes a charge upon the whole estate of the testator, and that the trustees are not bound at once to sell any portion of the property for the purpose of investing the proceeds in Government securities sufficient to produce the annuity. The will gives the trustees a discretion respecting a sale of the property. If, however, they do sell, they are bound to set apart sufficient to answer the annuity.—(*Burrell v. Delevante*, 31 L. J., Ch. 365.)

BARON AND FEME.—In an action against a husband for necessities supplied to a wife while living apart, the plaintiff's case being that the wife had originally left the defendant with his consent; had been since, by his instrumentality, wrongfully temporarily confined in a lunatic asylum; and after her discharge, had for a time received from him a weekly allowance wholly inadequate for her support, and had been compelled to accept this inadequate allowance in preference to returning to live with him, in consequence of his threat, that if she did return, he would send her to a lunatic asylum. It was held, the form of question to be left to the jury was—'Was the wife justified in leaving her husband, without his consent, by his conduct? If not so justified—Did he agree she might pledge his credit?' Held also, that the nature of the threat which would justify her in refusing to return to her husband, ought to have been explained to the jury. Bramwell, B.: It was held in *Johnston v. Sumner* (27 L. J., Ex. 341), that a plaintiff seeking to recover in an action for necessities supplied to a wife living apart from her husband, must show her authority to bind him; that if she live apart without his consent, she has no authority; if with his consent, and an adequate provision, she has no authority. It has been doubted whether she would have authority if she had no provision, or no adequate provision. I think such doubt is unfounded, and that this case makes it necessary to say so. For if the husband consent to the wife living apart from him on the terms that she shall not bind his credit, that consent is conditional; and if she do not perform that condition, she is not living apart with his consent.—(*Biffin v. Bignell*, 21 L. J., Ex. 189.)

INVESTMENT.—Under special circumstances, the Court, upon the petition of a tenant for life, sanctioned a change of investment from new L.S per cents. to Bank stock, but refused to allow any part of the fund to be invested in East India stock; and the fund being in Court, the costs of the tenant for life were directed to be paid out of the income, and those of the respondents out of the corpus.—(*Re Langford's Trusts*, 31 L. J., Ch. 334.)

COMPANY.—Certain stock of a railway company was standing in the books of the company in the names of two persons, T. and B. B., by a transfer executed by himself, and to which he forged the signature of T., transferred the stock to a third person, whose name was substituted upon the register for the names of B. and T. T. died soon afterwards. It was held (by the House of Lords, affirming the decision of the Master of the Rolls), that the personal representative of T. had a legal right to call on the company to replace the stock, though the right of action at law was gone. Lord Cranworth: It was said that the right in equity was dependent on there being a right in law. That was a mistake. It was not dependent on the right at law. There would have been no right in equity if there had not been a wrong that would entitle the party to bring an action at law; but on the principle of '*actio personalis moritur cum personâ*,' the right of action was gone. It did not affect the right in equity, which clearly was to have a specific transfer of the stock which had been improperly transferred.—(*The Midland Railway Company v. Taylor*, 31 L. J., Ch. 336.)

FALSE PRETENCES.—Where a married man induced a woman to give him a sum of money, by representing himself to be unmarried, and by promising that with the money he would furnish a house and return and marry her, he was held indictable for obtaining money by false pretences. Erle, C. J.: We are of opinion that this conviction is good, though it is clear law that obtaining money by false promise is not the subject of an indictment; yet in this case the prisoner pretended that he was an unmarried man, which was a false essential fact, by means of which he obtained money from the prosecutrix, and without which he would not have obtained it. One false fact, by means of which the money was obtained, is sufficient; though at the same time there were two false promises, neither of which would sustain the indictment.—(*The Queen v. Jennison*, 31 L. J., M. Ca. 146.)

CONTRACT.—Construction of stipulation for renewed contract of indemnity against loss by a solvency guarantee company. The agreement was signed by three directors, on behalf of the company, and by defendants, and also sealed with the company's seal; but it was held, the seal was only a statutory authentication of the contract, and that the instrument declared on was therefore not a deed, and that consequently the agreement might be rescinded by parol. Martin, B.: The fourth condition provides, that 'every guarantee shall be made for a specific term, but all guarantees upon gross annual returns, etc., whatever may be the original term of the same, shall, from the expiration of such original term, be treated as a renewed contract of the like nature and condition.' If it had stopped there, these words would have been an absolute contract for another term at the expiration of the original term of the like nature and condition as the other. Then follow those words: 'unless either the member interested therein, or the board of directors, shall give two calendar months' notice of an intention not to renew the same.' That may mean either at the end of the original term there shall be a renewed contract, unless the company on the one hand, or the defendants on the other, give two calendar months' notice that they will not renew it; or that there shall be a renewed contract at the end of every two years in the event of such notice not being given. In my opinion it points to only one renewal, in the event of either party not giving the prescribed notice.—(*The Solvency Mutual Guarantee Company v. Froese*, 31 L. J., Ex. 193.)

AFFIDAVIT.—An affidavit sworn before a notary abroad, will not be admitted unless it appears on affidavit that there was not at the place where it was sworn

a British consul, or other officer empowered by 18 & 19 Vict., c. 42, to take affidavits, and that a notary had by the law of such place authority to take affidavits. An affidavit, in which the addition or place of abode of a deponent is not inserted, will not be admitted.—(*In the goods of Bernard*, 31 L. J., Pr. 89.)

LEGACY.—Testator gave the residue of his real and personal property to trustees, to sell and stand possessed of the proceeds, upon trust to pay the dividends and interest thereof to his wife for life, to be by her expended in or about the maintenance of herself and the maintenance and education of his children; and after the decease of his wife, testator gave the principal of the said trust estate unto or amongst all his children equally, and to be paid to them as they should severally attain twenty-one, with benefit of survivorship amongst them. There were seven children; and two of them upon attaining twenty-one, while four of the others were yet infants, petitioned jointly with the mother that the amount of their shares might be paid to them for their advancement in the world. It was held, the shares became vested upon the children attaining twenty-one, and though the Court would not usually sanction the payment of the shares, where the whole income was not ample for the maintenance of the children, yet such a course might be adopted in this case upon the undertaking of the two children to secure to the mother the dividends which would have accrued in respect of those sums. *Kindersley, V. C.*: Two questions have been raised on this petition,—one is, whether the two sons take vested interests in the fund expectant on the death of their mother, and that depends upon the question as to what event the words of the will, ‘with benefit of survivorship among them,’ are to be referred. In cases of this kind the question is, whether those words refer to surviving the tenant for life, that being the period for distribution, or whether the survivorship related to the attainment of twenty-one. That must be solved by looking at the whole will, in order to ascertain whether those words are connected with the event of the death of the tenant for life, or attributable to the attainment of twenty-one. . . . It is clear that the words of survivorship are connected with the direction as to payment to the children at twenty-one, and are not connected with the termination of the life estate, as being the period of distribution. The two sons, therefore, take vested interests, expectant upon the death of the mother, in one-seventh share each. On the second point, the direction is not to maintain the children during their *minorities*; but the whole of the income during the life of the mother is to be for the maintenance of the children, and, therefore, the construction which should be put upon such a clause, if the question arose, would be, that any child who is at any time in a condition to require maintenance, should be entitled to be maintained by the mother.—(*Berry v. Bryant*, 31 L. J., Ch. 327.)

PROBATE.—In an interest suit, instituted by the Queen’s Proctor, who alleged that M. E., the deceased, died a widow, without lawful issue, intestate, and a bastard, the defendant, who claimed as nephew of the deceased, pleaded that M. E. was not a bastard; that she was the legitimate child of S. W. and Mary, his wife; that S. W. and Mary, his wife, had one other lawful child, of whom the defendant was the lawful child. It was held, that the plea was sufficient, and that it was not necessary that the time and place of the birth of the deceased’s parents should be alleged.—(*Her Majesty’s Procurator-General v. Williams*, 31 L. J., Pr. & M. 90.)

NULLITY OF MARRIAGE.—A. married B. in 1834. In October 1838 she left him, alleging that he was impotent, and that he himself had in many conversations admitted the fact. In November 1838, and from that time till 1854, she had tried to effect a reconciliation, maintaining herself all this time by her own means. Suits were then instituted against her husband for her debts; he then made her an allowance, which he continued till October 1858, when he proposed to reduce it on account of his altered circumstances. In November 1858 this

suit was instituted. It was held, that though delay was not an absolute bar to such a suit, it was a reason for requiring the strictest evidence of the complaint; and the Lords agreeing with the Court below that such evidence had not been given, affirmed the decree of that Court by which the suit had been dismissed.—(*H. v. C.* (House of Lords), 31 L. J., Pr. & M. 103.)

THELLUSSON ACT.—Testator bequeathed a sum of money to trustees to be invested, and the interest to be accumulated during the life of A. B., upon whose death the capital and the accumulations were to be held in trust for the benefit of the wife of A. B. and her younger children; and it was held, that this was not a bequest for the purpose of raising portions for younger children within the exception of the second section of the Thellusson Act. Kindersley, V. C.: My attention has been drawn to this word 'portion,' a general definition of which no judge has ventured to give. The legal meaning differs from the general one, and signifies in the case of a family settlement something which is provided for the benefit of the younger children; those are called 'portions,' because a portion or part is taken of the estate, although coming to be used in such a way that does not prevent its embracing the case of a provision for 'raising portions.' . . . In this case there is, in fact, no provision for raising portions for younger children. If it were necessary to decide whether this was a legacy or a gift of residue, my opinion is, that it is a residue beyond all question. But it does not turn on that. It is merely a gift of residue for the benefit of Mrs Lockwood and her children, and cannot be considered as a provision for raising portions for children.—(*Watt v. Wood*, 31 L. J., Ch. 338).

WIFE'S EQUITY TO A SETTLEMENT.—A married woman became entitled to a legacy of L.200, and applied for a settlement. The Court, in consideration of the husband having already spent some portion of the wife's property, and now living apart from her, and being unable to support her and her children, directed that the whole amount should be settled on the wife and her children. Kindersley, V. C.: Usually, where there is a husband and wife and children, and a sum of money belongs to the wife, the Court will settle one moiety on her, giving the other half to the husband. This, however, is not considered by the Court as a rule which binds it, but as a reasonable proposition, under ordinary circumstances, it being impossible to lay down a rule applicable to every case; where, however, there are special facts, they are taken into consideration. One question is, if the husband and wife and children live together, and whether he maintains them? Another, and a peculiar one, is, where money is given to the wife, the husband being a bankrupt or insolvent, the Court considers the assignee as standing in his shoes, and having a right to be considered, and it will give a portion to such assignee. . . . The question is, whether under the circumstances a moiety only should be settled, or what other portion? It appears to me, on the authorities, that the whole should be settled on Mrs Morle and her children.—(*In re Merriman's Trust*, 31 L. J., Ch. 367.)

PATENT.—Notice of objections to the sealing a patent were filed and afterwards withdrawn. The costs of the objections, and of the petition rendered necessary by them, were ordered to be paid by the objector.—(*In re Cobley's Patent*, 31 L. J., Ch. 333.)

ADMINISTRATION.—A. died intestate, leaving B., a private soldier, stationed in the East Indies, the sole person entitled to his personal estate. Upon A.'s death certain of his personal property was sold by auction, the proceeds of the sale remaining in the hands of the auctioneers. B. wrote to C., stating that he should not return to England for three years, and directing C. to take the necessary steps for lodging the proceeds of the sale in the Bank of England, with the exception of L.10, which he wished to be transmitted to him. The Court, under the 73d section of the Probate Act, granted administration to C., for the benefit of B., limited to receiving the proceeds of the sale, and paying it, with the exception of the L.10, into the Bank of England.—(*In the goods of Drinkwater*, 31 L. J., Pr. 93.)

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STATUTE LAW CONSOLIDATION.

WE have until now refrained from entering upon the discussion of a subject that has attracted a large share of the attention of English law reformers. We have avoided the subject from a conviction that no progress could be made in the direction of codification according to the plan marked out by the Statute Law Commission ; and because we believed that until the Legislature, or those responsible for the measures submitted to it, had come to be of the same opinion, the suggestions of journalists were not likely to be read with attention, or to be introduced into practice. It is evident that the public have already lost faith in the fulfilment of the hopes which have been held out for so many years, of a comprehensive codification of the statute law. Meanwhile the mass of practical statutes accumulates in an ever-increasing ratio ; while judges and counsel are more than ever embarrassed and confounded in the endeavour to ascertain with certainty what is, or is not, matter of subsisting legislative enactment.

The question which most naturally presents itself to the mind of the practising lawyer is, whether something cannot be done to consolidate the statute law in its more practical branches ? While amateur codifiers are employed, at the cost of a thousand or two per annum, in framing registers that are never consulted, as a preparatory training for the preparation of a code which Parliament will never pass, it does not seem unreasonable to call upon the governmental departments to do their part to assist the practitioner in the study of those enactments which he requires to collate and compare in the ordinary practice of his profession ; but which, unfortunately for him, are scattered through a variety of statutes of different

years—original, amending, repealing, and re-enacting, in every form of combination which hazard or caprice could have dictated.

We believe it is possible, by means of careful digests of particular branches of the statute law, periodically revised, to put the public in possession of the actual enactments of the law which they are bound to obey, and also to lighten the labours of the professional jurist. We believe also that the periodical publication of an expurgated and indexed edition of the statute-book by parliamentary authority would be a boon to the public, and a great advantage to the lawyers, who are often compelled to lose much time in searching the volumes of the existing editions for statutes, the exact reference to which is not known. But we utterly disbelieve in the practicability of any exhaustive or complete system of codification; and we are unable to discover the advantages attending such a codification, supposing that it could be carried into effect.

In a complete and systematic consolidation of the statute-book, it is implied that repealed clauses and parts of statutes, as well as statutes entirely repealed, should be expunged. Under such a system of revision, the retention of the chronological arrangement becomes impracticable; as it would be neither useful, safe, nor consistent with the dignity of an official edition to have isolated clauses of unrepealed Acts standing interspersed among other enactments to which they had no relation. Accordingly, all the schemes of codification that have been proposed start with the assumption that the existing statute-book is to be entirely abrogated, and its subsisting provisions re-enacted, after being classified according to the subject-matter and digested. This would be a work of enormous labour; and, after all, mistakes would be made which might seriously affect property.

But suppose the work to be efficiently performed; and that, in lieu of the statutes at large in fifty volumes, we obtain the British Pandects in three. What is to be done with the old editions? Make a bonfire of them, suggests the unreflecting reader. Keep them on the shelves, say we, and consult them oftener than before. In the first place, all statutes regulating the titles to heritable or moveable property must continue to possess a latent vitality, with regard to transactions effected during their subsistence; for, obviously, the validity of a title, or a question as to priority of possession, or of diligence, would fall to be determined with reference to the state of the law as at the time of the transaction. Again, all the existing de-

cisions upon the statute law bear reference, of course, to the statute-book in its present form. A reference to the original edition would therefore be essential, if only for the purpose of comparing the language of the original statute with that of the provision of the code, for the illustration of which the decision was to be cited. But, further, experience has shown that the consolidation of any important branch of the law is attended with the result of raising a number of points for decision, upon the construction of the consolidation statute. The same result would ensue, but to a much greater extent, from the introduction of a comprehensive code. On every question open to controversy, the authority of the ancient statute-book would be appealed to; and however carefully the original words were conserved, there would be something in the combination and arrangement of the clauses, or in the verbal alterations rendered necessary by a transposition of clauses, which would leave room for dubiety. For these reasons, we think that the codification of the statute law would not immediately, or for a considerable time, have the effect of obviating the necessity for a resort to the statutes at large; while the step would certainly be prolific in litigation, and in the uncertainty which is the parent of litigation.

Long before custom had settled the interpretation of the new code, and the statute-book had fallen into disuse, new enactments would have accumulated to an extent probably exceeding the bulk of the code itself, and a new process of codification would have to be gone through. That this result is certain, will appear, when it is considered that the octavo edition of the statutes, commencing in 1831, is already more voluminous than the condensed edition of all the statutes prior to that date. A new expurgated edition would, in all probability, bring the results of the last thirty years' legislation into the compass of three or four volumes; and this is what is chiefly to be desired at present. The editors of the quarto editions have purged the older volumes of the greater part of their lumber; and for the rest, it is to the modern volumes that the practical lawyer has most frequent occasion to resort. There lie the snares and pitfalls which he must contrive to avoid; there, among the chaos of amending and repealing statutes, where he may suppose the ideal of the glorious uncertainty of the law to have its most appropriate resting-place.

Codification, in short, is a dream; a fair and plausible illusion; adapted, perhaps, to grace the page of a *doctrinaire* exponent of jurisprudence, but quite unsuited to the constitution of a progressive

nation. Codification is but another name for finality : British law, happily for the people, is identified with progress. A code, to fulfil the conditions of its existence, must be permanent. Once admit the element of change, and the unity, the completeness, the certainty, which are at once the prime advantages and the essential characteristics of a code, disappear. But if such changes are to follow with the rapidity that has characterized our recent advances in jurisprudence and commercial polity, not only is the utility of the code destroyed, but its very substance becomes in a few years so completely disintegrated, that a new process of codification is rendered necessary, with all the attendant inconveniences which we have endeavoured to exhibit.

All the attainable advantages of codification might, we are persuaded, be procured by means of a periodical expurgation of the statute-book, in conjunction with departmental consolidation. Our proposition may be most conveniently illustrated by pointing out what remains to be done in this sense, with the legislation of our own times affecting Scotland. But before entering upon the practical suggestions which we have in view, and which may be explained very briefly, let us glance at what has been already done or attempted under the auspices of the Statute Law Commission, and by those who have been charged with the performance of the duties of that body since the expiration of its powers. The whole of the elaborate and expensive mechanism put in operation by that body, as preparatory to a general codification, we regard as so much money and labour thrown away ; but incidentally, some good work has been done in the nature of partial consolidation and excision.

The most important work undertaken by the Statute Law Commission was unquestionably the preparation of the Register of the Statutes. This Register has been carried back to the union of Great Britain with Ireland, at the commencement of the present century. Four barristers were employed in its preparation—for we do not know what length of time—at the cost of L.500 per annum each ; and if their whole time was conscientiously devoted to the irksome and unprofitable task, they were certainly not overpaid. It is true, the labour was clerk-work of the most mechanical description ; but if the work was to be done, we suppose it was necessary that it should be put into the hands of professional gentlemen acting under a sense of professional responsibility. The only fault we have to find with the Register is, that it is useless—as the reader will perceive

when we have stated the nature of the information which it conveys.

The references to the statutes are arranged in chronological order on the left-hand margin of the leaves of two folio volumes, of which the Register consists. The information which the Register professes to give is set out in a tabular form, occupying nine columns. The first column shows the chapter; the second, the subject-matter; the third, the class; the fourth, the section affecting or referring to the Acts noted in the next column; the fifth, prior Acts affected or referred to by the registered Act; the sixth, subsequent Acts, by which the registered Act is affected or referred to; and the blank spaces, when filled, show—the seventh, where the registered Act is expired or spent; the eighth, duration of the registered Act, where temporary and unexpired; the ninth, remarks. The third column, which distinguishes the class of the registered Act, refers to one of thirteen classes into which the Acts are separated for the purpose of the Register. The classes are—1. Armed forces; 2. Revenue; 3. Finance; 4. United Kingdom; 5. Great Britain; 6. England and Ireland; 7. England; 8. Scotland; 9. Ireland; 10. Local and Special Acts, subdivided into, *a*, Crown Lands; *b*, *c*, *d*, parts of, or institutions, or bodies in England, Scotland, and Ireland, respectively; *e*. miscellaneous, not falling under the other subdivisions; 11. Colonies; 12. East Indies; and 13. Suppression of the Slave Trade!

At a glance, it is apparent that the only columns which can be serviceable to the consolidator are those which specify the prior Acts which the statute in hand purports to repeal or modify; and the subsequent Acts by which it is in its turn repealed or modified. The rest is 'leather and prunella.' Nay more, of the two columns which we have by courtesy termed useful, one is unnecessary; for on turning to the statute itself, as printed by the Queen's printers, in the margin, opposite to the preamble, will be found a list of the previous statutes affected or repealed. All that was requisite to insure a correct list of subsequent repealing or modifying statutes was to employ a clerk to go over the marginal notes at the commencement of each statute *seriatim*, and make the requisite cross entries in the margin of each of the statutes there referred to. Such cross references will be found in the best editions of the statutes at large, for the period embraced in those editions. In any new edition of the statute-book it would be necessary, of course, to bring down the references to the present time. Such references, when given in the

margin of the statute itself, are extremely useful for purposes of reference; but their utility is much impaired when they have to be sought for in a separate register.

To the consolidator, the information given by the Register is so miserably inadequate, that he can make no use of it whatever. We speak from experience. When engaged in preparing an edition of the statutes relating to Court of Session Procedure last year, the writer of this article procured a copy of the Register, thinking that it might at least be serviceable to the extent of enabling him to prepare a complete list of all the statutes bearing on the subject. On applying a simple test, the Register was found to be inadequate; and, like a hack that has broken down at the first fence, it was forthwith discarded. It is superfluous to add, that in the practical work of consolidation, which consists in comparing *section* with *section*, and not merely statute with statute, the Register is not calculated to be of any assistance. It does not profess to deal with the separate parts of statutes. This simple consideration, had it presented itself to the minds of the Statute Law Commissioners, ought to have been sufficient to establish the absolute inutility of their expensive hobby.

The next achievement of the Commission is the statute 24 & 25 Vict., cap. 100, the Statute Law Revision Act. This Act recites, that with a view to the revision of the statute law, and particularly to the preparation of an edition of the statutes comprising only enactments which are in force, it is expedient that divers Acts and parts of Acts which have ceased to be in force otherwise than by express and specific repeal, should now be repealed. Then follows the repealing clause; and a schedule of 32 pages, consisting of a list of statutes thereby repealed, commencing with 11 Geo. III., cap. 32, and ending with 16 & 17 Vict., cap. 125. The great proportion of the statutes embraced in this list are such as, from their titles, were obviously of a temporary nature. The list does not include the annual Mutiny and Appropriation Acts; and we are curious to know upon what principle these important and necessary Acts have been omitted from the list of statutes requiring to be formally repealed, seeing that they answer the description of Acts which have ceased to be in force otherwise than by express and specific repeal. Be that as it may, the Statute Law Revision Act is obviously of no use whatever, except as a means of giving the imprimatur of the Legislature to the proposed expurgated edition of

the statutes, which was *in nubibus* when the bill in question was introduced, and of which the public have heard nothing during the year and a half that has since intervened.

In the same session of Parliament the Criminal Law Consolidation bills received the royal assent. These bills were understood to have been prepared and revised with great care; and we have heard of no complaints as to their working. One hundred and five statutes having been previously swept away by the Criminal Statutes Repeal Act, their substance has been embodied in five statutes, dealing respectively with larceny, injury to property, forgery, coining, and offences against the person. As a useful measure of practical consolidation, the preparation of these Acts is deserving of high praise; though, after all, 120 pages of legislation is but a poor return for the time, money, and anxiety that have been expended by successive Governments and Boards upon the question of statute law consolidation.

For the future, we trust that the two matters of expurgation and consolidation will be kept distinct, and that they will be prosecuted in the systematic and orderly way that befits the importance of the subject. As to the first, it is very desirable that at regular intervals, say every 15 or 20 years, the Queen's printers should be instructed to publish a new and portable edition of the statutes at large, in which those statutes that have been repealed, or that have expired, should be represented by their titles only, with a reference in the margin to the repealing statute, or to the date at which the statute ceased to be in operation. Those statutes which are either wholly or partially in operation should be printed *in extenso*, with marginal references to other statutes, prior and subsequent, which fall to be construed along with the Act in question. The editor should, of course, be a lawyer of experience, responsible to Government for the accurate performance of the important duty entrusted to his care. Copies should be sold at the cost of the paper on which they are printed, so as to put the statutes as far as possible within the reach of every subject desirous of making himself acquainted with the laws which he is bound to obey.

Independently of this periodical revision, it should be the duty of every department of Government, as occasion offers, to collect the stray leaves of legislation upon subjects connected with the department, and to incorporate the whole into a well-digested Consolidation Act. Special attention ought, of course, to be given to this

duty in the years immediately preceding the publication of a new official edition of the statutes, in order that the public may reap the full benefit of the simplification of the law, and that the edition may be cleared as far as possible from the incumbrance of obsolete enactments. These simple requisites seem to comprehend all that is practicable, and all that the practitioner need desire in the shape of codification.

We regret to observe that, as regards that portion of the statute law which is specially applicable to Scotland, no progress has been made with the work of consolidation. Through neglect of this necessary and merely mechanical task, the public have been unable to reap the full benefit of the numerous and valuable legislative reforms that have been introduced within the last fifteen years; while to the profession the risk of error, from the necessity of consulting a variety of statutes on every point of practice, has been very great. In the last year of the sitting of the Statute Law Commission, the subject of Scotch legislation was considered; and it is recorded in the minutes of that body, that the Lord Advocate had arranged to put this part of the work into competent hands. We are not aware that anything has yet been done in fulfilment of the pledge given to the public on that occasion. Yet in many of the most important departments of our law the statute-book is chaos. The criminal statute law is virtually a sealed book to the profession. A private print of the collected criminal statutes is in the hands of the Crown Office, and copies are furnished to the public prosecutors; but the means of access to this information are wanting to those entrusted with the defence of criminal cases. A digest of these statutes would undoubtedly be a work of much labour, but there could be no difficulty in finding hands competent to perform the task; and the cost would be but a feather's weight in the expenditure for the administration of criminal justice. The consolidation of the criminal statutes would be highly appreciated by men of all classes and parties. Its accomplishment would be a source of just pride and satisfaction to the legislator by whom it was undertaken in after years, when political contests and party triumphs had lost their interest.

Another example presents itself in the statutes regulating civil procedure. Of these, no less than one hundred bearing upon the practice of the Superior Courts have been collected in a recent edition; and there are, besides, a vast number connected with the administration of justice in the Sheriff, Justice of Peace, and other

inferior Courts. Besides the two great mines, or rather rubbish heaps, of unconsolidated material which we have mentioned, there are other departments of legislation, lying within a narrower compass, which might be greatly simplified and improved by the labours of a skilful consolidator. The conveyancing and entail statutes include something like twenty separate acts of legislation. A clerk cannot draw the simplest conveyance, unless he trusts to memory, without consulting the schedules of three or four different statutes ; and in the completion of a title, every one of the conveyancing Acts may happen to be consulted.

We shall mention one other subject only, though it would not be difficult to point to other branches equally in need of revision. The registration of voters depends upon the construction of four different Acts of Parliament, each designed to introduce a new system, superseding, though not expressly repealing, much of what was contained in previous enactments. There are the Reform Act, the Lands Valuation Act with its amendments, the Burgh Registration Act, and the County Registration Act. The machinery of the last two is not uniform. For example, the Burgh Registration Act continues the old form of appeal from one Sheriff's judicature to a court of three ; while, by the County Act, power is given to appeal to the Senior Lord Ordinary sitting along with the Lord Ordinary in Exchequer. At the present moment Lord Ardmillan, the Senior Lord Ordinary, is also the Lord Ordinary in Exchequer ; and it is doubtful whether the right of appeal exists at all. That, it may be said, is accidental ; but it ought to have been foreseen, and the neglect to provide for so obvious a contingency is a proof of negligence in the preparation of this statute. But, however that may be, the whole law of registration needs revision ; nor can we conceive of any objection to the consolidation of the mass of conflicting enactments, unless it be that their retention in their present form may give additional scope for the exercise of that right of appeal which is so ingeniously made dependent on the accidental separation of these two degrees of judicial rank, which are at present combined in the person of Lord Ardmillan.

HARD LABOUR NO PUNISHMENT.

THE public attention has been recently directed to a decision of the High Court of Justiciary, whereby it has been found that a party convicted may not only complain that a criminal conviction is too severe and *beyond* the powers of the magistrate, but that he has equal right to complain that a conviction is too lenient, and *within* the powers of the convicting magistrate. In either case, it is now held to be Scotch law that the convicted can complain; and that the conviction, in the one case because it is *beyond* the power of the magistrate, and in the other case because it is *less* than his power, must be quashed, and the convicted person set free from all punishment whatever. Nay, it may follow that he should have damages, because of an illegal conviction. The case is shortly reported in the last number of the *Journal*, p. 440, 30th June, *Ferguson v. Thom*; also 34 *Jurist*, 587.

The uninitiated public are apt to startle at the notion of a culprit successfully complaining that he has not had the full complement of punishment, and because he has not got that, escaping with none at all. It is quite open to understanding that, on the one hand, where an offender has received sentence to an extent *greater* than the law sanctioned, he has title and interest to complain; and on the other hand, where the magistrate had imposed *less* than the allotted amount, the *prosecutors* could appeal for an ampler measure of justice. But this is the first case on record where the *offender* made it his complaint that his punishment was not adequate, according to the legal standard.

If the principle be sound, it can be best tested by being pushed to extremes. If a sentence of imprisonment which omitted hard labour is no sentence at all, then the same must be held with regard to sentences of imprisonment or pecuniary penalty. The culprit who, by error or leniency, has been sentenced to six months' imprisonment, where the statute law had written down twelve months, is entitled to complain and to be set at liberty, not because he is innocent, but because he was not adequately sentenced for his guilt. The person who is fined L.10 instead of L.100, on the like showing, is free from all penalty. In like manner, where the statute provides for transportation or penal servitude, but simple imprisonment has been awarded, the culprit can complain of such illegal leniency, and be set free from prison. Nay, further, where the statute consigns

to the gibbet, but the judge has sent the offender to the gaol, the fortunate culprit can complain he was not hanged, and, in a different form of *suspension* in the Court of Appeal, he may be set free from all punishment. There is an Irish case (eminently Irish), where a judge at assizes condemned a murderer to be hanged, but omitted to order his body to be dissected. On discovering the omission, the unfortunate (or rather, as the event proved, fortunate) man was brought back, and the sentence amended. This was held so glaring an exercise of power after the judge was *functus*, that, with advice of the Crown authorities, the man received a free pardon. But here there was, and could be, no appeal; and it is thought that, had the sentence as first given been left undisturbed, there could have been no doubt of its validity.

The law, criminal and civil, requires both title and interest in a litigant. No one can prosecute in either Court but the very person injured, and who is to be benefited by the redress sought. So no one can appeal from a sentence, civil or criminal, who cannot show an interest to set it aside. In the case under observation, the *prosecutor* might have had a title and interest to complain of the conviction, because the full measure of justice had not been meted to him; but it is somewhat difficult to discover the title and interest of the party on whom the sword of justice had fallen too softly, to complain on *that* score, and call it injustice.

In the former case, where the prosecutor is the complainer that the magistrate had convicted *within* the margin of his power, the Court of Appeal might correct, and have corrected the defective award and filled in the full complement of punishment.

There is a case in point, and which elucidates the principle. The justices of Banff, under the Act 13 Geo. III., c. 54, convicted a person for having in his possession forty-four birds in close time. The statutory penalty for each bird is L.5, with a relative imprisonment of two months for each bird, and equivalent penalty; the gross amount, therefore, was L.220, and the full amount of imprisonment seven years five months. The justices, misled by a prior decision under a similar statute for the protection of trees, modified the penalty to 5s. and three days' imprisonment for each bird, or L.11 in all of penalty, and 132 days of imprisonment. The *prosecutor* appealed to the Justiciary, and succeeded in obtaining a judgment that the justices had no power of modification. It did not enter into the mind of the Court or the bar, that the conviction being not conform

to the statute, was *funditus* void; though the judgment of the Court proceeds on the ground that 'the punishment is not imposed after conviction, *in terms of the statute*.' The Court got quit of the difficulty of imposing a punishment to an extent reserved for the very highest grades of crime, by requesting the counsel for the prosecution to restrict the complaint. This was very courteously done, and a conviction very leniently sought only for four birds, or L.20 of penalty, and eight months of imprisonment. The Court on this remitted to the justices to amend their conviction accordingly. It seems to follow that in the case of *Ferguson* the form of procedure was not to quash the conviction, which was admittedly within the power of the justices, but to have remitted to the justices to gratify the convicted party by adding hard labour to his sentence.

The case above referred to is that of *Whatman v. Ogilvie*, 3 June 1854, 1 Irvine 483.

Suppose that the respondent in the case of *Whatman* had become complainer, and pled that the statute having imposed certain fixed penalties, which amounted in all to L.220 of money, and to upwards of seven years of imprisonment, but which the justices had illegally modified, '*contrary to the statute*,' to his prejudice. Then, according to the principle recognised in the recent case of *Ferguson v. Thom*, the complainer would be entitled to have had the sentence quashed, and be liberated from penalty. It was unfortunate for the poor poacher that the happy idea had not been suggested of *thus* obtaining relief from all punishment whatever.

It may be said that the cases differ, in that the one was a sentence for a pecuniary penalty, with imprisonment to enforce payment, whilst in the other case it is hard labour as a distinct punishment separate from imprisonment. It may be argued that in the first case the difference was only in amount of penalty or extent of imprisonment, whereas in the other case the matter of difference was in the *kind* of punishment—imprisonment with, and imprisonment without, hard labour. This argument is much too subtle for ordinary minds. The labour is much more an integral part of the imprisonment, than the imprisonment is of the pecuniary penalty. The imprisonment might be suffered without the labour, but the labour could not be endured without the imprisonment. The imprisonment was imperative, and could not be avoided, as the statute gives no option of fine, whereby the prison may be escaped. But in the other case, if the penalty was paid, there would have been no im-

prisonment. Therefore the two branches of the sentences are clearly separable. The lower the penalty, the greater probability of payment, and therefore of the contingent imprisonment being avoided. The mistake in the case of *Whatman* was therefore much more radical than in that of *Ferguson*.

In numerous cases where justices have added somewhat incompetent to a sentence otherwise right, the Court of review have felt no difficulty in separating the vicious from the legal portion, and upholding the latter. Thus in the case next reported in our *Journal*, and decided the same day as that of *Ferguson*, the justices in Quarter Sessions affirmed a conviction under the Day Trespass Act, adding the expense of the unsuccessful appeal with corresponding imprisonment. But the Court of Justiciary, whilst they quashed this last, confirmed the first part of the conviction and punishment.—(*Snaddon v. Spence*, 30 June, 34 Jurist, 588). Many other cases may be cited where the Court of Appeal have separated parts of sentences. If, in the case of *Ferguson*, the justices had *added* hard labour when the statute did *not* authorize such, the Court would, without hesitation, have upheld the imprisonment and cancelled the addition of hard labour. The converse seems equally sound; and the Court, as in *Whatman's* case, might in *Ferguson's* appeal have upheld the imprisonment, and remitted to the justices to add the hard labour.

The most curious part of the reasoning on which the judgment in *Ferguson v. Thom* is based, is discovering in the convicted party an *interest* to complain by assuming that the Legislature had in view the offender's good, and that hard labour was added to imprisonment for his special benefit; in short, that so far the sentence was a positive reward, and that, deprived of this, the sweet of the cup, he was entitled to eschew the bitter portion of the draught.

This reasoning goes very deep into the whole philosophy of punishment, and is deserving of mature consideration.

It is not easy to perceive where the line is to be drawn between punishment as corrective, and monitory. The style of the indictment is sound:—‘You, A. B., *alias* C. D., *alias* E. F., ought to be *punished*, that YOU and all others may be *deterred* from committing the like crimes in all time coming.’ This reasoning is by no means to be confined to hard labour: fine and imprisonment are equally corrective, and therefore intended as much for the benefit of the culprit as for society. It follows, therefore, that a subtraction of the

full amount of punishment in *any* form is just so much of the beneficial training of the offender withdrawn, of which cruel deprivation he has reason to complain. But unfortunately he does not get his pretended wrong remedied, but the whole amount of moral discipline is withdrawn, and he set free untrained and undisciplined to commit the offence anew.

The same argument for the convicted party under the Trespass Act was open to the poacher. He too could say that he had been led into a life of criminal ways, and could not restrain himself or support himself by industry; and therefore to be detained for a short period would do him no possible good, but to be kept at the public expense for seven years a pensioner of the state was indeed of the greatest consequence to his present and future weal; and that he therefore insisted on having the utmost pound-weight of the covenanted punishment, or none at all. He could enlarge on the great evils of short imprisonments, and the great benefit of lengthy detentions; and he could quote authorities of the highest order in favour of his position, including some of the judges of the land, both in England and Scotland.

With regard to the special statute under which, in the recent case of Ferguson, the conviction was obtained and quashed, it must be recollected that it was intended as an *English* statute. Mr Tait, no mean authority, expressly stated, in his work on the Duties of Justice of Peace, that it did not apply to Scotland. The contrary has, however, since been held. But it is at all events a *British* statute, so that what is understood by hard labour at the time the statute became law in both divisions of the kingdom, must be kept in view.

At the date of the statute (1823) prisons were so many ‘*Castles of Indolence*’—prisoners herded in large day-rooms to play pitch and toss, or other amusements equally congenial to their refined tastes. The loss of liberty (if licence could be so called) was the only kind of restraint—hard labour was the only real punishment. Therefore at that period the reverse of the reasoning of the judges in the recent case was the rule. The imprisonment was rather of the nature of the reward, and the hard labour the real punishment.

In recent times all prisoners are tasked to work under the prison rules, and this forms an integral part of all sentences of imprisonment. Every prisoner is tasked to ten hours’ work every day by the prison rules, without any warrant to that effect in the sentence

er conviction. Hard labour is exceptional, and its application is the crank machine. This is *hard* with a vengeance, but not *labour*. It is grinding the air. Those who know its operation will never for a moment bring it within the category of useful work, beneficial to the workman. It is reserved for offenders of the lowest grade, and it never could have been contemplated to reach workmen whose offences may be of the most venial description, and generally are rather of a civil than a criminal character—such as brief absence from service, or trivial misconduct in the performance of ordinary duty.

It seems to have been supposed that the class of persons who fall within the scope of the statute were all of the male sex—ordinary workmen—stout, hale, and sturdy, to whom work would be a boon. But on looking at the statute-book it will be found, after embracing a lengthy and most ludicrous enumeration of trades, amongst which is the comprehensive term of '*handycraftsman*,' it finishes with the all-absorbing term '*or any other person*.' Accordingly, under this statute persons of both sexes and of all ages have been convicted. If the addition of hard labour is to be incorporated in every statutory sentence, a truant mill girl or operative artist may for many months be put to the torture of the crank machine—to emerge from prison with fingers incapable of performing the delicate operations to which they had been accustomed.

There are serious doubts on the policy of labour being ever made a punishment for crime. That which is the prerogative and the privilege of man ought not to be thus dishonoured, nor ought the honest labourer ever to be placed on the same level as the idle thief. So long as the bodies of murderers were consigned to the anatomical theatre, as a part of the judicial sentence, there was a morbid feeling in the general public as to violation of sepulchres. The graveyard was watched with fidelity, and often was the scene of deadly contest, whilst medical students were sunk to the class of midnight marauders. So soon as this stigma was removed, there was no longer the outcry against the medical profession as body-snatchers, and the table of the anatomical lecturer never wants its necessary supplies. Similar effects may be justly supposed to follow from making labour an object, not of approbation, but of punishment—the denizen of the prison rather than the factory. When idleness was the rule of the prison, hard labour was introduced in almost every statute. But such was seldom ever enforced,

and no case of appeal by a prisoner, founded on the omission, is to be discovered in English reports, where objections the most technical are found in multitudes. Bentham remarked, even at the time he wrote, 'Sentences of commitment to hard labour are as frequent in our penal code *as the execution of them has been rare.*' The policy of thus giving a bad name to industry, the parent of wealth and population, and setting it up as a scarecrow to frighten criminals with, is what I must confess I cannot enter into the spirit of. I can see no use in making it either odious or infamous.'

BIOGRAPHICAL SKETCHES OF THE SENATORS OF THE COLLEGE OF JUSTICE.

No. VII.

THE MASTER OF STAIR.

THE lapse of nearly two centuries, and the general ignorance now-a-days of Scottish national history, have done much to obliterate it; but at one time there was no name held in more universal execration throughout Scotland than that of John Dalrymple, second Viscount and first Earl of Stair. It is well worth inquiring how far the popular indignation was just, and to what extent it was extravagant.

Dalrymple, who was the eldest son of the great James, Viscount Stair (and as such, called the Master of Stair), was born in 1648, and came to the bar in 1672. He would appear to have displayed at a very early period those qualities as a lawyer and an orator, to which he may almost be said to have had an hereditary claim. In particular, at the famous trial of Argyle in 1681, he took a prominent part as one of the advocates for the unfortunate Earl. About this time his father became so obnoxious to the Duke of York and his party, that he was obliged to escape into Holland. The Master remained at home, but the Government found means to vent their displeasure against him, by subjecting him to repeated fines and imprisonments. On one occasion especially, in 1684, he was, as Forbes relates (preface to the Journal, p. xxxvii.), thrown into the Tolbooth of Edinburgh without 'any shadow of ground' whatever. There he remained for several months; and even when released from actual incarceration, he was not permitted to pass farther than ten miles from Edinburgh, for the space of upwards of a year. To all these indignities he seems to have submitted with the best grace

he could, biding the time when the tide of fortune would turn in his favour. Nor had he very long to wait, for in the beginning of 1687, when Sir George Mackenzie was removed from the office of Lord Advocate, Stair was appointed his successor. In 1688 he succeeded Sir James Forbes both as Lord Justice-Clerk and as an Ordinary Lord of Session. When the Revolution took place, Dalrymple had no hesitation as to the side which he should espouse; and so conspicuous a part did he take on behalf of the new dynasty, that he was appointed one of the three commissioners to offer the crown to William and Mary. James marked his sense of his conduct at this juncture, by making him one of the six persons excepted from the operation of his intended Act of Indemnity (*Douglas' Peerage*, ii. 527). Dalrymple was not reappointed to the bench after the Revolution; but in 1690 he again became Lord Advocate, and in 1691 he was promoted to the office of Secretary of State, in connection with which he is best known. Scotland was at this time, we need hardly say, in a most unsettled state. A large portion of the nation,—and that the most prone to disturb the public peace,—was still well disposed to the exiled family, and could not bear to see a phlegmatic Dutchman on the throne so lately occupied by a race who, with all their failings and vices, had seldom failed to command a large share of personal regard. The Stuarts had been kings throughout nearly the whole known history of Scotland: their names were associated with all its renown; they had shared the dangers of the field, the pleasures of the chase, and the gaieties of the court, with their people. But now they had been supplanted by a foreigner, who, if his nature permitted him to love anything at all, would have preferred a trim Dutch garden, with its gorgeous tulips and straight canals, to all those beauties of nature which constitute the glory of ‘the land of the mountain and the flood.’ The personal qualities of our kings may not be of much importance at the present stage of our Constitution, though even of that we are by no means sure; but their importance cannot be over-estimated at a period when assuredly representative institutions were on their trial. William’s character was such as to provoke the very worst feelings on the part of a large proportion of his Scottish subjects. What mattered it to them that he nourished schemes of most profound wisdom for the preservation of the balance of power in Europe, and the restraining of the ambitious designs of France and the crafty

policy of Rome? He never held court at Holyrood; and what attention he could spare from Europe and Holland he bestowed on England, to the total neglect of his northern kingdom. It required, therefore, statesmen of no mean order, and no over gentle nature, to carry on the King's government in Scotland. A statesman, in many respects, admirably fitted for the task, was found in the Master of Stair. His abilities were splendid, his knowledge of public affairs complete, and his determination inflexible. He saw at once that it was only by high-handed measures that peace and prosperity could be secured. The work had to be done, though woe it may be to him who had to do it. The surgeon scruples not to amputate the diseased limb; and so Dalrymple scrupled not to use the severest remedies, even to the violent removal of a portion of the body politic, for the general good. Tell the story of Glencoe as you will, it was a bloody and a cruel deed; but coupled with the scarcely less butcherly fight at Culloden, it did good service to Scotland. The beneficial results which flowed from these events, we admit, will neither save Stair's nor Cumberland's memory from reproach, nor relieve their character from the stain which rests upon it. But in troublous times and great crises, deeds must be done promptly; and we who live quietly and critically under our own peaceful vines and fig-trees, should be careful and very charitable in our judgments on the men of action who do them. The most unsettled portion of the nation consisted of the Highland chiefs and their clans. This arose partly from their strong attachment to the deposed King, perhaps still more from their naturally lawless and predatory disposition. These people not only refused to give their allegiance to the new King, but continued to commit havoc on the property, and even the persons, of their more peaceful neighbours. This was a state of things which Dalrymple could not endure; and he therefore procured a royal proclamation, requiring all the Highland chiefs to submit to the Government before the 1st January 1692, under penalty of being 'subjected to the extremities of fire and sword.' Before the appointed day, all the chiefs came in, except M'Donald of Glencoe; and he failed, through a mistaken idea that Colonel Hill, the military governor of Fort William, had power to receive the oath of allegiance. As it was, M'Donald took the oath before the Sheriff of Argyleshire, on the 2d January, unluckily one day beyond the precise period specified in the proclamation. Having taken the oath, he returned to his own gloomy glen, and there lived unsuspectingly among

his people. Dalrymple used the advantage he had obtained, through the remissness of old Macdonald (or MacIlan, as he was called), most unrelentingly. He obtained, under the sign-manual, instructions, containing at the close these portentous and now memorable words: 'As for MacIlan of Glencoe and that tribe, if they can be well distinguished from the rest of the Highlanders, it will be proper, for the vindication of public justice, to extirpate that set of thieves.' The King would seem to have been deceived as to the fact of MacIlan's having come in, though too late, else in all likelihood he would have refused to sign the instructions. The instructions once issued, were at once put into the hands of the military authorities; and under them, on the 13th February following, a deed of treachery, cruelty, and blood was perpetrated, which has scarcely any parallel in history.

'The hand that mingled in the meal,
At midnight drew the felon steel,
And gave the host's kind breast to feel
Meed for his hospitality!'

'The friendly hearth which warm'd that hand,
At midnight arm'd it with the brand,
That bade destruction's flames expand
Their red and fearful blazonry.'

Thirty-eight persons, many of them old men and children, were murdered in cold blood, and those who escaped had to fly upwards of twelve miles, among precipices and torrents, before they got to a place of safety. Dalrymple expressed no contrition for what had happened. On the contrary, he obviously regarded it purely as a piece of State policy, to be judged by considerations of political expediency, not by a reference to the ten commandments. The public, however, judged otherwise, both in Scotland and elsewhere; and ultimately, in 1695, a Royal Commission, issued for the purpose of inquiring into the matter, made a report so strongly against Dalrymple, that he was deprived of his office and obliged to retire from public affairs. Just before his fall, the Darien Scheme was in full operation, and Dalrymple did all in his power to induce the King to give it that support, the want of which ultimately ruined it, and cost so much life and property. In fact, in all matters, except the Glencoe affair, he appears to have governed admirably, and done much to pave the way for the great measure of the Union which was carried in the succeeding reign. In 1695 his father died, and he became entitled to sit in Parliament; but so strong was the odium against him, that he did not take his seat till 1700. From that period,

however, he took his accustomed part in the conduct of public affairs; and by his great eloquence and consummate skill in the management of a deliberative assembly, he did more than any one to advance the Union. In 1703 he was created Earl of Stair, and in 1705 one of the Commissioners for the Treaty of Union. He did not live to see the measure passed, on which he had spent so much time and labour. On the 8th January 1707, after having debated with his usual ability one of the last, if not the very last, Article of the Union, he 'walked home after it, and dined very cheerfully with company' (Douglas, ii. 526). The same night he died.

Of Dalrymple's talents, the following may no doubt be taken as a truthful estimate, for the writer was his bitter enemy :—

'He had a piercing judgment, a lively imagination, a quick apprehension, a faithful memory, a solid reflection, and a peculiar talent for dissimulation, so that he was seldom or never to be taken unawares. He was extremely facetious and diverting company in common conversation, and, setting aside his politics, goodnatured. To these qualifications was added that of eloquence, being so great a master of it, that he expressed himself on all occasions and subjects with so much life and rhetoric, and that likewise so pointedly and copiously, that there was none in the Parliament capable to take up the cudgels with him.'—*Lockhart's Memoirs*, p. 97.

Upon the Massacre of Glencoe itself, two verdicts cannot be passed; but different writers have pronounced very different judgments on the motives of Stair in so far as he was concerned with it. Sir Walter Scott (*History of Scotland*, vol. ii., pp. 132, 133, 138) speaks of him as the 'vindictive Secretary of State,' and says, 'The Secretary's letters to the military officers, directing the mode of executing the King's orders, betray the deep and savage interest which he took personally in their tenor, and his desire that the bloody measure should be as general as possible. . . . He could not suppress his joy that Glencoe had not come in within the term prescribed, and expresses his hearty wishes that others had followed the same course.' Again, 'This detestable butchery excited general horror and disgust, not only throughout Scotland, but in foreign countries; and did King William, whose orders, signed and superscribed by himself, were the warrant of the action, incredible evil both in popularity and character. Stair, however, seemed undaunted, and had the infamy to write to Colonel Hill, while public indignation was at the highest, that all that could be said of the matter was, that the execution was not so complete as it might have been. There was, besides, a pamphlet published in his defence,

offering a bungled defence of his conduct; which, indeed, amounts only to this, that a man of the Master of Stair's high place and eminent accomplishments, who had performed such great services to the public, of which a laboured account was given,—one also, who, it is particularly insisted on, performed the duty of family worship regularly in his household, ought not to be over-severely questioned for the death of a few Highland Papists, whose morals were no better than those of English highwaymen.' The bias of Sir Walter's mind is easily discernible throughout these passages. For ourselves, we confess to more sympathy with Lord Macaulay's remarks in his eighteenth chapter:—

'The Master of Stair was one of the first men of his time,—a jurist, a statesman, a fine scholar, an eloquent orator. His polished manner and lively conversation were the delight of aristocratical societies; and none who met him in such societies would have thought it possible that he could bear the chief part in any atrocious crime. His political principles were lax, yet not more lax than those of most Scotch politicians of that age. Cruelty had never been imputed to him. Those who most disliked him did him the justice to own that, where his schemes of policy were not concerned, he was a goodnatured man. There is not the slightest reason to believe that he gained a single pound Scots by the act which has covered his name with infamy. He had no personal reason to wish the Glencoe men any ill. There had been no feud between them and his family. His property lay in a district where their tartan was never seen. Yet he hated them with a hatred as fierce and implacable as if they had laid waste his fields, burned his mansion, murdered his child in the cradle. . . .

'To what cause are we to ascribe so strange an antipathy? This question perplexed the Master's contemporaries; and any answer which may now be offered ought to be offered with diffidence. The most probable conjecture is, that he was actuated by an inordinate, an unscrupulous, a remorseless zeal for what seemed to him to be the interests of the State. This explanation may startle those who have not considered how large a proportion of the blackest crimes recorded in history is to be ascribed to ill-regulated public spirit. We daily see men do for their party, for their sect, for their country, for their favourite schemes of political and social reform, what they would not do to enrich or to avenge themselves. At a temptation directly addressed to our private cupidity, or to our private animosity, whatever virtue we have takes the alarm. But virtue itself may contribute to the fall of him who imagines that it is in his power, by violating some general rule of morality, to confer an important benefit on a church, on a commonwealth, on mankind. He silences the remonstrances of conscience, and hardens his heart against the most touching spectacles of misery, by repeating to him that his intentions are pure, that his objects are noble, that he is doing a little evil for the sake of a great good. By degrees he comes altogether to forget the turpitude of the means in the excellence of the end, and at length perpetrates, without one internal twinge, acts which would shock a buccaneer. . . .

'The Master of Stair seems to have proposed to himself a truly great and good end—the pacification and civilisation of the Highlands. He was, by the acknowledgment of those who most hated him, a man of large views. He justly thought it monstrous that a third part of Scotland should be in a state scarcely less savage than New Guinea, that letters of fire and sword should, through a third part of Scotland, be, century after century, a species of legal process, and that no attempt should be made to apply a radical remedy to such evils. The independence affected by a crowd of petty sovereigns, the contumacious resist-

ance which they were in the habit of offering to the authority of the Crown and of the Court of Session,—their wars, their robberies, their fire-raising, their practice of exacting black mail from people more peaceable and more useful than themselves,—naturally excited the disgust and indignation of an enlightened and politic gownsmen, who was, both by the constitution of his mind and by the habits of his profession, a lover of law and order. His object was no less than a complete dissolution and reconstruction of society in the Highlands,—such a dissolution and reconstruction as, two generations later, followed the battle of Culloden.'

It is worth while giving, as a conclusion to this sketch, two very different epitaphs written upon Lord Stair,—the first too complimentary, the second too abusive:—

'Alace! He's gone, Alace! What shall we say?
The Oracle of Law, the Church's Stay;
The State's Support, our Ancient Kingdom's Glory
Is gone, is gone, O lamentable story!
He who of late in Senate House did shew
Profound experience, and his perfect view
Of all the knotty subjects of debate
Which so much puzzl'd have our wits of late,
By whose sage counsel, and assistance rare,
So much is done in the now grand Affair;
Of reconcealing these two jangling States,
Removing strife, contention, and debates,
Uniting both in interest, wealth, and peace,
All sorts of discord must for ever cease,
And we the happiest men on earth must be,
While this great patriot's fame shall never die.
In fine, my friends, this noble peer you'll find
Has few or none his equals left behind.'

(*Pamphlets*—Adv. Lib., A.A.A. 1-6. No. 223.)

The other is from the 'Scottish Pasquils' (p. 69), and runs thus:

'Stay, passenger, but shed no tear,
A Pontius Pilat lyeth heir,
Whose lineage, lyfe, and final state,
If ye'll have patience, I'll relate.

He mock'd at murdering single man,
His noble aime reach't a whole clan.
Lest ought but hell sould equall's guilt,
Man, wyfe, and bairnes blood must be spilt;
Tho' they were innocent, no mater,
The complement to a friend the greater.
But thes being crymes below his station,
He's bravelie since murdered his nation;
All thes being done by his advyce,
He hes ridden post to gett his pryce.
For tho' religione allwayes cloak'd him,
Yet now at last the devill hes choak't him.
For of him he had no more neid,
Since Cain his heir wes to succeed.
Now passenger, pass on with speid,
For seldom lyes the devil dead;
Make haste, if thou thy safety pryze,
For legions haunts wherever he lyes.'

ON THE SIXTEENTH SECTION OF THE CONJUGAL RIGHTS ACT.

THE regulating part of the section is in the following terms:—
 ‘ When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling under the *jus mariti*, or husband’s right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*.’ An exception is then introduced by way of proviso, in case of the husband, or his creditors, having previously obtained a title by possession, or by the use of diligence.

We are not aware of any case in which the intervention of the Court has been sought, since the passing of this enactment, for the purpose of securing to a married woman a competent settlement out of property which would otherwise have fallen under the husband’s *jus mariti*, or right of administration. The necessity of raising an ordinary action for the purpose of determining the amount of the settlement, doubtless is a serious obstacle to the successful application of the equitable rule introduced by the statute; but this circumstance alone does not appear sufficient to explain or account for the failure of the remedy; and we incline to think that the proviso to which we have referred has had the effect of counteracting to a great extent the benevolent intentions of the Legislature, as expressed in the operative part of the enactment. In the great majority of cases in which the interest of the family and the justice of the case demand that a provision should be made for the wife out of property falling under the *jus mariti*, it will happen that some act of possession or some execution of diligence on the part of creditors has intervened, bringing the property into the position contemplated in the proviso. That which Parliament has dealt with as an exceptional case, is, in truth, the rule rather than the exception; and the interest of the wife is thus necessarily excluded

in the very class of cases in which it was most necessary that it should be recognised.

Still, there are cases where the form of procedure under consideration may be advantageous; as an example of which, we may instance the case of a husband, when perfectly solvent, succeeding to property through his wife, and desirous of making an irrevocable settlement in her favour out of the estate. By the common law, any settlement he could make after marriage would be *revocable*; and his creditors would be entitled to call upon him to execute a revocation in their favour. Under the authority of the 16th clause of the Conjugal Rights Act, a competent settlement might be provided to the wife by the Court, out of property coming from her own relatives; and this settlement would be irrevocable.

In England, where the principle introduced by the Act of last year has been in operation for a long period, it has received the name of the doctrine of the 'wife's equity to a settlement.' In the hope that an acquaintance with the rules that have been developed by the Court of Chancery may aid the practitioner desirous of testing the usefulness or applicability of the legislative remedy under consideration, the following brief summary of these rules has been drawn up:—

In England the jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife, was assumed by the Court of Chancery in cases where it was necessary to apply to that Court for assistance in order to obtain possession of the wife's property; when the Court, acting on the maxim that he who seeks equity must do equity, refused to interfere unless a provision were settled on the wife in fulfilment of the husband's duty of providing for her (*Bosvile v. Brander*, 1 P. Wms. 459). The wife's equitable right arising in such circumstances was called her equity to a settlement.

The doctrine has since been greatly extended. It is now competent to the wife to assert her right actively, and not merely *ope exceptionis* (*Elibank v. Montolieu*, 5 Ves. 737; and see *Newenham v. Pemberton*, 1 De G. & Sm. 644). The wife's equity to a settlement is binding not only on the husband, but upon his *assignees* in bankruptcy, or under a general trust for payment; and it may be made to affect *legal* as well as *equitable* interests, if the property should become the subject of a Chancery suit (*Sturgis v. Champneys*, 5 My. & Cr. 97, where all the previous authorities are cited by

Lord Cottenham ; see also *Hanson v. Keating*, 4 Hare, 1, decided by Sir J. Wigram). A wife is entitled to a settlement out of property to which she becomes entitled before, as well as after marriage (*Barrow v. Barrow*, 18 Beav. 529). It is immaterial what the nature of the property may be. Life interests as well as estates in fee are subject to the equity (*Sturgis v. Champneys*, *ut supra*).

Where the wife insists on her equity, it is extended to her children ; and the Court direct a reference, or remit to ascertain what is a proper settlement to be made upon her and her children (*Elbank v. Montolieu*, *ut supra* ; *Johnson v. Johnson*, 1 J. & W. 472). But if the wife has died without asserting her right, the children cease to have any claim (*Scriven v. Tapley*, 2 Edin. 337, the leading case ; *De la Garde v. Lempriere*, 6 Beav. 344, decided by Lord Langdale). Again, it is settled that, at any time before the actual execution of the settlement, the wife may waive her right to it, and thus defeat the interests of her children. ‘It is,’ said Lord Cottenham in *Hodgens v. Hodgens* (11 Bligh, N. S. 104), ‘against the husband that the Court exercises jurisdiction, to exclude him from those rights which the law would otherwise give him ; and then the Court deals with those rights as between the wife, whose property is in question, and the children of the marriage, in such a way as may be thought for the interest of the family.’

It is pretty clear that the Court of Session, in the exercise of the powers conferred by the Conjugal Rights Act, would not be entitled to take the ultimate interests of the children into view. All that they are entitled to award, is a ‘reasonable provision for the support and maintenance of the wife.’ This may be considered to include the maintenance of the children *in familia*, but would not comprehend provisions to be afterwards paid to them. However, if after the amount of the settlement had been fixed, taking into view all the circumstances mentioned in the Act, a wish were expressed by the wife that the fee of the fund should be settled upon the children, we apprehend that the Court would not refuse such an application ; but, if it appeared to be for the ultimate benefit of the family, would give effect to it. The mode of settlement most usual in English practice in such cases, is that by which the interest of the fund is given to the wife, to her own separate use, and the capital to the children, payable in the case of sons at majority, in the case of daughters, at majority or marriage (*Gent v. Harris*, 10 Hare, 383,

384; *Francis v. Brooking*, 19 Beav. 349). If there should be no issue, the reversion will be given to the surviving spouse (*Carter v. Taggart*, 1 De G. M'N. & G. 286; *Bagshaw v. Winter*, 5 De G. & Sim. 466).

This mode of settlement, however, is only resorted to in cases where the property consists of a capital sum. If the fund is a life-rent, a certain proportion is settled upon the wife for her maintenance; and there being no capital, there is of course nothing remaining for the children.

It would appear that a distinction has been taken, with reference to the rights of onerous assignees, between the cases, where the wife takes a life interest alone for her own benefit, and those where a fixed sum is to be settled upon her in life-rent, and the fee upon the children. In the former class of cases, it is held that the right of an onerous assignee of the life-rent subject is preferable to that of the wife; in the latter, the interest of the wife and children forms a burden on the assignee's right. The ground of the distinction (which appears to be rather technical than substantial) was thus explained by Vice-Chancellor, now Lord Justice Turner, in the case of *Todd v. Lister*: 'In the cases where the wife takes an absolute interest, her right to a provision for herself and her children is independent of the acts and conduct of the husband; in the case where she takes a life interest only, her right to a provision for herself arises from the non-fulfilment by him of his obligations, and is wholly dependent upon his acts and conduct. In the cases, too, where the wife takes an absolute interest, the purchaser takes, subject to the well-known and settled equity; but where the wife takes for life only, the equity by which it is said the purchaser must be bound, may not exist at the time of his purchase, and, depending as it does upon the conduct of the husband, may never come into existence. And in this respect also there is a great distinction between the particular assignee for value and the general assignee; for in the case of the general assignee, the very bankruptcy or insolvency on which his title is founded, creates the right against him.' It will be observed that the Legislature, in extending the benefit of the wife's equity to Scotland, has assimilated her rights, as against assignees, to the rule which prevails in England with respect to life interests.

The questions of greatest practical importance with reference to the provisions of the recent Act, are those which relate to the amount of the sum to be settled, and the proportion to be observed between

the wife's provision and the entire fund. As to amount, the usual practice of the Court of Chancery is to settle one-half of the wife's property upon herself, reserving the other half for the husband or his creditors. But in particular circumstances the rule may be varied. In one case, where a husband had separated from his wife, leaving her unprovided for, Sir L. Shadwell, V.C., gave her three-fourths (*Corter v. Corter*, 9 Sim. 597. See also *ex parte Pugh*, 1 Drew, 202; *Vaughan v. Buck*, 1 Sim. N. S. 284). By recent cases it has been settled, after considerable fluctuation, and notwithstanding the authority of an adverse decision by Lord Ch. Sugden (*Napier v. Napier*, 1 D. & W. 407), that the Court may in special circumstances settle the whole fund on the wife; as, for example, where the husband has already received large sums from the wife's father, which have been applied in liquidation of debt (*Gardner v. Marshall*, 14 Sim. 575); or where the fund is of inconsiderable amount (*in re Kincaid's Trusts*, 16 Jur. 106); or where there has been misconduct on the part of the husband (*Dunkley v. Dunkley*, 2 De G. M'N. & G. 390; *in re Cutler*, 14 Beav. 220; *in re Merriman's Trusts*, 31 L. J. Ch. 367).

When the settlement falls to be made in bankruptcy, the Court inquire what amount of property the husband has received from first to last, and assign a provision proportionate to that amount. It may happen that the whole residue of the wife's fortune is inadequate to provide a maintenance for her; and in such a case there would be little justice in adhering to any arbitrary rule of apportionment as between the family and the husband's creditors. 'The question,' said Sir L. Shadwell, in a case of this kind, 'is in effect, what settlement ought to be made on the wife, out of the whole property which came by her? and the sums that her father advanced to the husband, are in substance, though not in form, part of her fortune.' And, accordingly, his Honour appointed the whole remaining funds to be settled on the lady (*Gardner v. Marshall*, *supra*).

LEGAL APPOINTMENT.—Mr Donald M'Leod Smith, Advocate, has been appointed Sheriff-substitute of Elginshire, in room of Mr Patrick Cameron, resigned.

Correspondence.

BUSINESS OF THE COURT OF SESSION.

[We have much pleasure in directing the attention of our readers to the lucid and dispassionate statement of our correspondent, who has evidently made himself master of the subject on which he writes. We shall be glad to receive the additional contribution which he promises.—ED. J. J.]

To the Editor of the Journal of Jurisprudence.

SIR,—Although I have ceased personally to practise in the Court of Session, I take an interest in observing the manner in which causes are now conducted and justice is administered. I frequently attend to see and hear what goes on, and I am a reader of your Journal. I have, during the last half century, witnessed many changes in matters of form and practice—some for the better, and some doubtful. Of the changes made by direct legislation, among the most important have been the introduction of trial by jury—the system of articulate condescendence and pleas in law in all cases—the total abolition of representations and reclaiming petitions, and the all but total abolition of written arguments. On some of these I may, if permitted, at a future time make remarks. But I have also witnessed changes, not less notable, that have taken place without direct legislation; and upon some of them I propose, with your leave, to offer a few observations for the consideration of members of the legal profession. I have been somewhat prompted to do so at this time by the article in your July number, entitled ‘Business of the Court of Session.’ A problem is there presented for solution, which is thus stated:—‘The cases before the Court of Session had, until lately, been increasing for many years; the general litigation of the country is still increasing. . . . There is a vastly increased commerce and population, giving rise to an increase of transactions, mercantile and social, yet the business of the Supreme Court is diminishing. This is a fact; how is it to be accounted for?’ To the question so put, the answer given by the writer is, ‘They (the litigants) are disappointed that they cannot obtain within a reasonable time, and without unnecessary expense, the judgment of the distinguished lawyers who now adorn its bench. The dissatisfaction that prevails relates to imperfections of administration, and it is idle to talk of any other reason for the present state of the Rolls of Court.’ This answer is followed up by an exposition of delays that occur at various stages of a cause, a reference to the expense and other evils that attend such delays, and some practical suggestions as to remedy.

I do not underrate the importance of the question propounded, or the interest that attaches to it, or the benefits that may result from a careful and impartial inquiry into the causes of the state of matters described as existing. At the same time, I think it is of some consequence that the exact state of the facts which gave rise to the question, and the precise conditions and objects of the inquiry, should first be fully understood. Expedition and economy in the adjudication of rights are ob-

jects undoubtedly desirable in themselves, and to be encouraged ; although the result desiderated by your contributor, viz., a progressive increase of law-suits, may not be sure to follow ; and although the existing state of matters may be somewhat less objectionable than he assumes it to be. Some, indeed, may doubt whether decrease of litigation is a thing to be deplored, or whether a general increase of litigation is to be desired. Statists and economists have not yet classed law-suits among the indications of national prosperity, or of moral or social improvement ; and my own observation inclines me to the belief that periods of mercantile distress, or of raging speculation terminating in disaster, have been about the most prolific in law-suits. In times of prosperity, transactions may be more numerous ; but debtors are not so frequently unable or unwilling to pay, nor are there so many of those legal conflicts to which bankruptcies almost always give rise. When trade is sound, and conducted on wholesome and honest principles, by well-trained merchants, who make their transactions with business-like precision and accuracy, there is little room for dispute as to facts, and little call for the intervention of courts of law ; and the more points that have, in course of time, been settled by decision or legislation, the fewer remain to be tried. I speak of the ordinary course of things. No doubt, periods do occur when, by legislation or otherwise, there are suddenly reared up new relations of parties, new rights and new interests in property ; and from these new soils spring luxuriant crops of litigation for a time. As an example, I may refer to the period, not very distant, when the formation of railroads suddenly excited universal attention, and advanced with extraordinary *impetus*, engrossing a large proportion of the capital of the country, and at the same time increasing the demand for law and labour. But these are exceptional periods, and it may reasonably be doubted whether prosperity is the true source or measure of litigation. Even if it could be so regarded, recent legislation supplies reasons why the business of the Court of Session should have diminished rather than increased of late. I may instance the extension of the jurisdiction of the Sheriff Courts, and especially as regards matters of bankruptcy and certain matters affecting heritable rights, now become fully operative, and which has deprived the Court of Session of much of the monopoly it enjoyed ; while, also, the increased numbers, intelligence, and activity of the practitioners in these local courts is calculated more than ever to retain within the circle of their attraction most of the available means which the public-spirited inhabitants of the district can afford to devote to litigation.

I have reason to believe that in some sanguine minds it has been too readily assumed that the stream of litigation in the Court of Session ought to be found always on the increase and never diminishing. But any one who has been an observer as long as I have been, or who has taken the trouble to examine into the matter, will have learned that the tide of litigation in the Court of Session has its periods of ebb and flow. Of late it has been ebbing somewhat, though as regards actual business it has not ebbed so much as appears to be assumed ; for although the number of new causes enrolled has been less, the proportion of litigated to unlitigated causes has of late been very much greater than it was some years ago. Thus, in 1851, the number of decrees in absence was in the proportion of about 1 to every 24 of the new causes

enrolled. In 1861, the number of decrees in absence was only about 1 to every 5 $\frac{1}{2}$ of the new causes enrolled. In the Inner House, the number of reclaiming notes and other litigated causes together, was, as nearly as possible, the same in the years 1851 and 1861. The extent to which the actual business of the Court has for the time decreased, is therefore by no means alarming. Nor is the diminution attributable in any degree to increasing arrear, or to extension of the time that causes remain unheard after they are ready for hearing. On this point, let me again refer to the state of the business as it stood at the end of each of the years 1851 and 1861. At the close of the year 1851, the total number of causes before the Lords Ordinary ready for hearing, but not heard, was 251, whereof 97 were before one Lord Ordinary. At the close of 1861, the total number of causes not heard was only 134, and of these the greatest number before any Lord Ordinary was 42. At the close of 1851, some of the causes unheard had been ready for hearing in the previous winter session. At the close of 1861, none of the causes unheard had been ready longer than from the previous summer session. Then as regards the Inner House, at the end of 1851 the number of causes in the First Division ready for hearing was above 200, and the causes in course of being heard had been ready for upwards of two years. At the close of 1861, the number of causes ready for hearing was under 40, and the causes in course of being heard had not been ready so much as two months. In the Second Division, where the amount of business was not so great, there was practically no arrear to signify, either in 1851 or 1861. I should add, that in regard to the important class of summary causes, instead of an habitual arrear of several months, there is now habitually no arrear. It thus appears that, as regards the real business of the Court, a great load of arrear has of late years been worked off, and the progress of causes has been much accelerated. In fact, at the close of the year 1861, the business of the Court was more advanced than at any previous period in my long recollection. This amount of progress has been made in face of adverse currents and influences, to which I shall afterwards advert. It has been achieved partly by sitting more hours each day, partly by extra sittings in spring and autumn, and partly by a judicious exercise of the power of distributing the business, whereby all the Lords Ordinary and both Divisions have been kept constantly occupied. It is not improbable that this progress, and further progress, if made in the same direction, may have the effect of discouraging the class of causes which have for their object to stave off the fulfilment of just obligations; but that is a consummation devoutly to be wished for by the honest portion of the public, and not to be lamented by respectable practitioners. I speak from some experience when I say that such causes and clients are more vexatious and troublesome, than they are agreeable or satisfactory.

Having directed attention to the fact that the tide of litigation has its periods of reflux, and that it would be unphilosophical and unreasonable to expect that it should always be advancing; having shown that any decrease of late years in the substantial business of the Court is more apparent than real—that it is in some degree attributable to recent legislation, and is in no degree attributable to contemporaneous increase of delay or of stagnation, both having of late years not increased, but materially abated,—am I therefore of opinion that further acceleration is

either not desirable or not attainable? By no means. On the contrary, I think that increased acceleration is desirable and is attainable. I think it is desirable for the sake of all those persons, be they few or many, who at any time find it necessary to appeal to the law in order to assert or to defend their rights; and I think it is attainable to a considerable extent by means which are under the control of those who have to deal with causes in their progress through Court.

The matter of expense, to which as yet I have scarcely adverted, is in a different position in this respect, that of late years it has been on the increase. It has already increased fearfully, and it is still increasing. It is a clamant evil; but I am not without hope that remedy for this also may be found within the pale of existing powers, and may be applied without inflicting hardship or injustice on any one. The two matters of expedition and economy bear in many respects upon each other, and I propose to resume the consideration of them in another letter. In doing so, I shall notice the proper functions of the several parties whose duty it is to deal with causes in their progress through Court. At present I do not venture to trespass further on your space.

AN OLD PRACTITIONER.

July 2, 1862.

English Cases.

COSTS, TAXATION OF.—A professional witness is entitled to his expenses on the scale allowed to persons of his profession, although he is not called to give professional evidence.—(*Parkinson v. Atkinson*, 31 L. J., C. P. 199.)

LANDS CLAUSES CONSOLIDATION ACT.—The Commissioners of Woods and Forests took possession of certain property under two special Acts of Parliament, and paid the purchase-money into Court. By the first of these special Acts, passed before the Lands Clauses Act, it was enacted, that the Commissioners should be liable to the costs of reinvestment of the purchase-money in other lands. By the second special Act, passed subsequently to the Lands Clauses Act, the powers and provisions of the former special Act were extended to this. Upon a petition for payment of the money out of Court to the parties interested, it was held (overruling the decision of one of the Vice-Chancellors), that the Commissioners were not liable to pay the costs of the petition, although such costs would have been payable under the Lands Clauses Act. The Lord Chancellor: When the Lands Clauses Act, forming part of the 9th & 10th Vict., c. 34, was passed, the Legislature was under the impression that they were enacting a machinery for all public undertakings, and therefore did, in general terms, attach the Act to all works of a public character. But it was limited in this way in the 1st section—namely, that its clauses and provisions were not to be applicable when they should be ‘expressly varied or excepted’ by any Act thereafter to be passed. And there was another restriction involved in it—namely, that they should apply to the undertakings authorized by such future Act, ‘so far as the same should be applicable to such undertakings.’ Therefore, the point to be ascertained was, whether for subsequent undertakings the clauses and provisions of the Lands Clauses Act were varied and excepted, and whether those clauses and provisions were applicable to them. . . . By the 18th section of the 9 & 10 Vict., c. 34, it was provided that the Commissioners for executing that Act should have ‘such and the same powers, authorities, privi-

leges, and exemptions' as were given them by the 3 & 4 Vict., c. 87, thus providing that the powers given by the former Act were extended to powers given under that Act. This excluded the Lands Clauses Act. The directions to take the provisions of the one Act excluded the use of the other Act.—(*In re Cherry's Settled Estate*, 31 L. J., Ch. 351.)

DISSOLUTION OF MARRIAGE.—A suit for dissolution of marriage cannot be maintained against a lunatic. Where such a suit had been instituted, the Court refused to appoint a *curator ad litem* to the respondent to enable the petitioner to proceed with the suit. The Judge Ordinary: I have made inquiries as to the practice of the Ecclesiastical Court in similar cases. There is no reported case to be found; but I am informed by Dr Bayford that in a case argued by himself in the Court of Arches, Sir H. J. Fust rejected a similar application to the present one in a suit against a lunatic for a divorce *a mensa et toro*. Acting upon that precedent, I must refuse to allow the petitioner to proceed further with the suit.—(*Bawden v. Bawden*, 31 L. J., Pr. M. 94.)

EVIDENCE.—Upon a proceeding under 9 Geo. IV., c. 61, sec. 21, against an alehouse-keeper, etc., for unlawfully and knowingly permitting divers persons of notoriously bad character to assemble and meet together in his house and premises against the tenor of his license, such alehouse-keeper is not a competent witness, and cannot give evidence in his own behalf.—(*Parker v. Green*, 31 L. J., M. Ca. 133.)

WINDING UP.—In order to constitute a valid sale of shares, so as to entitle the vendor to have his name excluded from the list of contributories, though it is not necessary that the purchaser should be a person capable of meeting all demands that may be made upon him in respect of the shares, yet the transaction must be *bona fide* as between the vendor and purchaser, in order to exclude liability. Wood, V. C.: It is not a bargain in the sense of a transfer of property; there was no intention that any property should be transferred, but simply an agreement with this man that he would subject himself to imprisonment or anything else for the sake of L.2, 10s. I agree in the observation made by the counsel for the official manager, that if this could be insisted upon as a bargain, the Court would positively require that there should be proof, at all events, that every circumstance was explained to the transferee; that the transferee was told that there was a call of L.250 that he might be called upon to pay; and that he fully understood the position he was putting himself in at the time this transaction was entered into.—(*Re the Phoenix Life Assurance Company, ex parte Hatton*, 31 L. J., Ch. 340.)

CUSTODY OF CHILDREN.—Where a petition for dissolution of marriage is dismissed, the Court has no power to make an order as to the custody of, or access to, the children of the marriage. The Judge Ordinary: It will probably have a salutary effect on the interests of public morality that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of, or access to, her children. Even if I possessed the power (which I think I do not) to make an order giving the respondent access to her children, in such a case I should not make one.—(*Sedden v. Sedden*, 31 L. J., Pr. and M. 101.)

MEDICAL ACT, RETROSPECTIVE OPERATION OF.—The Medical Act, 21 & 22 Vict., c. 90, s. 32, which (as amended by subsequent Acts) enacts that after the 1st of January 1861 no person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act, does not apply to an action commenced before, but tried after the 1st of January 1861. *Quære*—Whether the application of galvanism by a galvanic operator is the performance of an operation within the Act.—(*Thistleton v. Frewer*, 31 L. J., Ex. 230.)

THE

JOURNAL OF JURISPRUDENCE.

THE GAME LAWS.

IN our number for June 1859 (vol. iii., p. 281), we sought to expose some of the anomalies and inconsistencies which exist in the administration of the Game Laws.

Our article was successful to the extent of directing the attention of the public press to the subject; and this, we fear, is all that can be accomplished by writing on the Game Laws, until the eyes of those who fancy they are interested in the maintenance of the present system are opened to the fact, that the interests of the rural population are identical with those of the landlord. The subject has again been forced on the attention of the public by the narrow-minded legislation of the last session, and we avail ourselves of the opportunity of fulfilling a long-deferred promise to proceed with our review of the legal aspects of the question.

Our object is not to enter into the abstract question of the *policy* of the Game Laws, but to observe on the complication and conflict of the numerous statutes which have been passed to protect the game, but which unquestionably have hitherto only increased their odium with the general public, and the difficulty of their enforcement.

In addition to the powers at common law to interdict trespass on land, we enumerated four or five separate statutes under which a person may be punished for one and the same offence. Since our article, and at the very close of the last parliamentary session, an additional and very stringent statute has been added to the catalogue, and which has already borne fruit, and promises to yield a rich harvest of litigation in both divisions of the kingdom, and has even received illustration by that *Magister Moris*—PUNCH.

The recent statute was passed after a severe struggle and many

divisions; and its consummation was accompanied with a notice of a motion for next session, for the consideration of the whole system of Game Laws. This inquiry is imperatively demanded, and must be conceded. We are hopeful that it will result in one simple code of laws for both sections of the United Kingdom. There is no reason why the partridge and the pheasant should be under greater protection on the one side the Tweed than the other, or the invader of their homes and haunts should be dealt with in a manner so very different on English and on Scotch territory.

We venture to think that our former article will point out some few of the anomalies which presently exist in the law of game, and we now add some other of the difficulties experienced in its administration.

There are two series of Trespass Acts—one for the day, and the other for the night. The distinction between the penalties or punishments in these statutes is very great and startling.

The Day Trespass Act, 2 & 3 Will. IV., c. 68 (1832), known as the Duke of Buccleuch's Act, has for its operation (sec. 3) from the last hour before sunrise until the first hour after sunset. The penalty (sec. 1) for the simple trespass is L.2; but these ominous words are added, 'together with the *costs of conviction*,' under which the penalty, it has been held, may be legally increased fourfold, and indeed to any indefinite extent. (See 5 Dec. 1859, *Porter v. Stewart*, where the Court, after inquiry, sustained a fine of 2s. 6d., with L.3, 14s. 9d. of expenses. 32 Jurist, 147.) If the trespasser has his face blackened (the statute does not say whether by sun or by soot), or if there be a phalanx of five (why this odd number instead of the three in the Night Act, is not apparent), then the penalty is increased from L.2 to L.5, with the addition now of the '*expenses of process*,' instead of the *expense of conviction*, which last are retained in the corresponding section of the English statute (sec. 5). If the trespasser do not quit the land on command of the person having right to kill the game, or the occupier of the lands, or *any* gamekeeper (he does not require to be the guardian of the territory), or the '*servant of either of them*,' that is, the servants' servant; or if the trespasser refuse to tell his Christian name, surname, and place of abode (that is, supposing that the trespasser have all these requisites, and especially a place of abode), or if he give 'a *general* description of his place of abode as shall be illusory for the purpose of discovery' (such we may suppose to be the Cow-

gate or Canongate of Edinburgh); or if he wilfully continues or returns to the forbidden land; then he may be apprehended without warrant, and carried at once before a justice, and summarily convicted, and found liable in the penalty of L.5, with 'the expenses of process,'—this favourite Scotticism again supplanting the words, 'costs of conviction,' in the English statute (sec. 2). Game in possession of the trespasser may (by sec. 5) be seized for the use of the person entitled to the game upon such land. (But what if the game was taken on the land of another?) The statute has no provision for prosecutors under the first section for simple trespass, though in practice the proprietor of the lands, without the concurrence of the fiscal, has alone this privilege. But for the higher offence and severe penalty under the second section, the statute provides for prosecutions at the instance 'of the owner or occupier of the land or the procurator-fiscal of the county.' The penalties are made payable to the kirk-session of the parish, for the benefit of the poor thereof. Though for the offence under the second section the penalty is double that under the first, yet the imprisonment (sec. 8) is identical for both—not exceeding two months; and the convicting magistrate has power either to require immediate payment, or to allow a certain term for that purpose. One justice (without any disqualification) and one witness is sufficient in both classes of offences. But an *additional* penalty may be incurred under the sixth section, for 'assaulting or obstructing *any* person acting in the execution or in virtue of the powers and provisions of the Act;' then two justices are required, and the imprisonment for this separate offence is for a period not exceeding three months, which is supposed, like the penalty, to be also *additional*. There is an appeal to Quarter Sessions against a *conviction* (but not otherwise); and the Court of Justiciary has held itself the proper Court of control on any informality in the proceedings or excess of power.

The Act is one throughout bristling with difficulties; and few statutes have been more productive of litigation in the Justiciary, whose decisions have not always been very consistent or easy of reconciliation. One source of the difficulties is the not uncommon one of endeavouring to apply an English statute to Scotland, regardless of the difference in legal technology, and the peculiar *formula* in the Courts of each country.

The contrast between the Day and Night Acts is as distinct as

between day and night itself. The principal Act against night poaching is 9 Geo. IV., c. 69 (1828). This Act coincides with its brother of the day as to the division of time, allowing the margin of an hour for twilight in favour of the day (sec. 13).

The offences are, first, 'the unlawfully, by night, taking or destroying any game (subsequently more minutely enumerated) or rabbits on *any* land, whether open or enclosed; or *second*, unlawfully entering or being on any land, whether open or enclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game.' The penalty is not pecuniary. For the first offence, the punishment is for any period not exceeding three months, 'to be kept to hard labour' (which is now imperative on the magistrate to enforce); and, in addition, caution is required, under the penalty of L.20, that the offender shall not again so offend for twelve months, and failing such caution, to be further imprisoned for *six* calendar months (without power of modification), accompanied again with the addition of hard labour,—making in all *nine* months imprisonment. For a second offence, the primary imprisonment is extended to any period not exceeding six months, with security now increased in amount to L.30, and the term of the bail to two years, and the imprisonment failing caution to twelve months,—making in all *eighteen* months, with hard labour during the whole term. In case of a third offence, or where three or more persons offend together, it passes into a category wholly unknown in Scotch law, a '*misde-meanour*' punishable by imprisonment, with hard labour, for any term not exceeding two years, or transportation beyond seas for *seven years*. Transportation being now changed to penal servitude for the like period, there arises an obvious conflict between the two modes of punishment. The first and second class of offences may be tried before two justices (sec. 1), (with appeal to Quarter Sessions (sec. 6), or before the Sheriff of the county (sec. 10),) which, according to recent light, excludes his substitutes, and nullifies numerous convictions given and sustained by the Supreme Court. The third degree of offence is competent only to the Justiciary, and who, it has been decided, have no jurisdiction to try the minor offences: 25 April 1850, *Bell*, 1 Shaw, 348. The instance or concurrence of the fiscal is essential to all prosecutions under this statute: 29 January 1844, *Graham*, 2 Broun, 85.

Poachers, who are very quick in perception, discovered a flaw in the statute, in so far as it required a trespass on land. They

accordingly were in the practice of standing on public roads and spreading nets across gates and openings to fields. By the aid of dogs they drove game within the meshes of their net, and thus in a manner *fished* for game without contravening the letter of the statute. To meet this evasion it was reserved to Mr Robert Wallace, then member for Greenock, to introduce an amended Act for Great Britain, which he successfully carried through without opposition. This affords a happy illustration how a country gentleman, though of ultra-popular politics, can become so enamoured with field sports as to forget his many invocations of the rights of the people and the liberty of the subject. The patriotic member electrified the House, in introducing the Bill, by the statement that it ought to have been more appropriately designated 'An Act to prevent murder by night.' The Wallace Act extended the prior statute to the taking or destroying game or rabbits on any public road. The actual taking of the game is necessary under the statute.

What we at present desire to observe is the very great distinction of penalty or punishment between the statutes against poaching by day and by night. The former is content with a moderate pecuniary penalty, subject to modification; the latter visits the offenders by lengthened periods of imprisonment, accompanied with hard labour, and neither of which can be modified.

It becomes, then, of the greatest importance to ascertain with certainty the exact line of demarcation between day and night, where an error, however slight, is attended with consequences so very great. This, we fear, is little attended to. It is impossible under the statutes to libel alternatively on both statutes, leaving it to the judge to apply the evidence and convict accordingly. The offences are distinct and separate, and the mode of procedure wholly diverse, and does not admit of conversion. There have been cases where the magistrates have refused to convict on the one statute libelled, where it appeared that, though a trespass was committed, it was without the statute libelled and within that not founded on. A minute, nay, a second of time, if clearly ascertained, would have the effect of placing the offence under one or other of the statutes, as much so as would the whole hour of marginal time. The same rule would here apply as a scruple in weight or a farthing in money would regulate offences measured by the standards of weight or value. Accordingly, in indictments for night poaching, the setting forth of the definition of

night, as given in the 12th section, is held essential: 25 April 1844, *M'Kenzie*, 2 Broun, 147. In England, where a poacher was apprehended at eight o'clock in the morning of 17th December, the Court held it necessary that it be proved that the poacher was in pursuit of game an hour before the sun rose: *Rex v. Tomlinson*, 7 P. C. 183.

The mode of proof of time has occasioned much controversy and difficulty. It is generally of the very loosest and unsatisfactory kind. Where the offence is at or about noon or midnight, the witnesses may with safety swear to the notorious fact, that it was within the statutory definition of the day or night; but frequently cases under both Acts merge on the debateable boundaries. The day poacher 'homeward plods his weary way;' a hare crosses his pathway in the dark, and the temptation is too great; so he discharges his gun, and is pounced on by the ever-watchful gamekeeper: or in the morning, one of the same class goes with early dawn to some distant cover, but in like manner unexpectedly falls in with some of his favourites by the way. Then comes the question, Night or day? The gamekeepers swear to the eventful hour having begun or not begun. On examination, they maintain two highly important facts—the time of seizure and the time of sunrise or sunset. The latter is given on the authority of some penny almanac; the former on the authority of some ill-regulated watch, ruled by some still worse regulated German clock of the cottage, which in its turn is ruled by the clock of the village church, which generally is once a-week put right on Sabbath by that nondescript son of science—the kirk-officer. All this is most unsatisfactory. Occasionally, 'Oliver and Boyd,' the primate of almanacs, is put in as evidence; but it is doubtful whether such can be received as legal proof. There is a case on record in Ireland, where a murderer was saved the gallows by means of an almanac with a page printed for the purpose, showing, contrary to the evidence of all the witnesses for the prosecution, that there could be no moonlight at the time they swore, as the orb of night had not risen 'round as a shield' for two hours beyond the time sworn to by the witnesses. In England, the calendar attached to the Common Prayer Book is admitted as evidence of certain facts; but the almanac, however useful generally as a book of reference, has never yet in either country been admitted as *probatio probata* of its multitudinous contents.

But granting that the judge may take judicial notice of the

facts stated in the almanac, it has escaped observation that time is a fleeting quantity in more respects than one. Since the introduction of the telegraph, it is not uncommon to receive a message at a great distance a long time before it has been despatched at the other end. The calendar is calculated according to Greenwich time. The gamekeepers or witnesses must therefore be required to make a nice calculation of equation of time, and with all the risk of error which attaches to the problem of 'settling the longitude,' before they can with certainty say when the sun rose at the locality of the offence, and the exact time before or subsequent to that phenomenon the offence was actually committed. According to the note appended to 'Oliver and Boyd,' 13 minutes must be subtracted to rectify the time between Greenwich and Edinburgh. This disturbing element of course is increased as the scene of offence is to the north, south, east, or west of Edinburgh. The mode of reckoning in the repealed statute, 57 Geo. III., c. 90, was greatly preferable to the astronomical data substituted in its place. By that Act, the night was fixed between the hours of six in the evening and seven in the morning from the 1st October to 1st February, between seven in the evening and five in the morning from 1st February to 1st April, and between nine in the evening and four in the morning for the remainder of the year. According to this rule, only *one* element of reckoning was required. Gamekeepers had only to be provided with accurate watches, regulated by public or railway time, and then there would be little or no difficulty in ascertaining the exact time. The public would, in like manner be certiorated of the boundary-line of offence. It would not, as now, be a shifting point, fluctuating with every day, so what was an offence to-day ceased to be so to-morrow, and conversely.

There are some other points of interest and practical importance which we may deal with in a future number. With the view of a parliamentary investigation, it is right for every citizen to lend his aid in obtaining these laws placed on a more satisfactory basis, and the many evils of which they are now the parent mitigated, if not altogether removed.

One thing is obvious, that the *legal doctrine* that game is *not* property, and belongs to the finder of it, is quite inconsistent with the spirit of the manifold enactments which render it far more sacred than any property whatever. In mere justice to the class to whom the Game Laws hold out a temptation to a career of crime, many

persons are of opinion that it would be better to get rid of what is little better than a *fiction*, and declare game to be the property of the owner of the land on which it is found. That simple declaration would at least relieve the Courts from the opprobrium of entertaining a class of questions in which the Acts relating to trespass by day or by night are prolific, and from the subtle difficulties attending their solution. The appropriating of game without leave of the owner being treated as theft, would at once divest the poacher of all the heroism of which he boasts, and of the sympathy he receives from the general public as a martyr to what are considered iniquitous laws.

BIOGRAPHICAL SKETCHES OF THE SENATORS OF THE COLLEGE OF JUSTICE.

No. VIII.

ALEXANDER SWINTON of Mersington, who was appointed an Ordinary Lord in 1681, and reappointed in 1689 after the Revolution, was chiefly remarkable for his zeal as a supporter of Presbytery. It is curious to note how this fact influences the character which is given of him by writers of opposing religious opinions. Thus Balcarras, describing a popular outbreak against the Papists at the time of the Revolution, says it was headed by Mersington, 'the fanatick judge, with a halbert in his hand, and as drunk as ale and brandy could make him.' His Lordship had, at all events, the support of the civic authorities; for Balcarras states that he was accompanied by the 'provost and magistrates.' Nevertheless he goes on to say (p. 43), that after plundering the Abbey and Jesuits' House, the 'gentlemen and rabble broke into the Earl of Perth's cellars, and made themselves as drunk with wine as they were before with zeal; for, two or three days thereafter, they rambled up and down the town, searched and plundered what Roman Catholic houses they could find, which were very few, except some Catholic ladies whom they used villanously; nor did the Council anything to hinder their disorder.' On the other hand, Sir James Stewart, the Lord Advocate, in a letter to Carstairs, dated Aug. 1700 (State Papers, 625), describing Mersington's sudden death, says, 'On Tuesday last, the Lord Mersington dined well with a friend in the Merse, and went well to bed' (query, are the two *wells* to be read in the same sense, or is the former to be read in that of 'not *wisely* but too *well*'?)

‘but was found dead before four in the morning, his lady in bed with him, who knew nothing of his dying. A warning stroke. He was a good man, and is much regretted.’ It should be stated that Sir James Stewart was himself one of the best-abused men among the Presbyterians.

JAMES MURRAY of Philiphaugh was born in 1655. He represented the county of Selkirk in the Conventions of 1678 and 1681. He was a strong supporter of the Presbyterian party, and as such was very obnoxious to the Government. On several occasions he was accused of taking part with the ‘rebels;’ but it was not till 6th October 1681 that these charges were finally disposed of. Fountainhall says (Decisions i. 159), ‘The Council found Philiphaugh had malversed and been remiss in punishing conventicles, etc., and therefore they simply deprived him of his right of Sheriffship of Selkirk—it not being heritable, but bought by King Charles from his father, and declared it was devolved in the King’s hand to give it to any other. Some said, seeing the Duchess of Lauderdale’s courtship; by which he had stood, was now dried up, he came off well that he was not likewise fined.’

The most doubtful part of Murray’s conduct is connected with the trials for the Rye House Plot. Having been mentioned in Carstairs’ confession, he was thrown into prison in September 1684, and being threatened with the ‘boots,’ at once admitted that he had been engaged in a plot against the Government, which had been going on for several years. He was at first liberated on bail, but afterwards received a pardon, in order that he might give testimony at the trial of Baillie of Jerviswood and others. He was examined accordingly at Baillie’s trial, and upon his and other evidence that gentleman was convicted and executed. No other person suffered in Scotland the last penalty of the law for being concerned with the plot; but Murray gave evidence when the Earl of Tarras, Polwarth, Torwoodlee, etc., were forfeited.

‘It was doubted,’ says Fountainhall (i. 303), ‘how far thir testimonies, extorted *per torturam*, can be probative against third parties, seeing witnesses should be so far voluntary and spontaneous, as to be under no impressions or terrors of fear of life or limb; others judge them best to be credited then. Some thought our Privy Council would have been at some loss, and contracted some task by this cruel torture, had they suffered it as they did the boots (which they regarded not, their legs being small), without discovering or revealing this conspiracy; but their confessing tends to justify the Privy Council’s procedure.’

One's sympathies are all with the conspirator under trial, and against his associate bearing testimony, however true, against him. But it must be admitted that the torture, and even the boots, which Fountainhall affects to disregard, were very powerful modes of diligence for the recovery of testimony, and we cannot be too thankful that we live in times free alike from plots and their consequences. It would appear that Murray's conduct did not do him any serious harm with the Revolutionary party, for we find that he was one of the first judges nominated to the Scottish bench after the succession of William and Mary. Nor was this the only preferment he obtained at the hands of the Government; for he was twice appointed Lord Register, and ultimately retained that office, along with his judicial one, till his death, which happened in 1708.

SIR DAVID HOME of Crossrig was admitted advocate in 1687. From Pitmedden's account, it appears that he was exempted from the usual trials, in respect Fountainhall and certain others testified to the diligence with which he had at one time studied Civil Law and obtained proficiency in it, but that, 'for weighty reasons, he had desisted from such close prosecution of his studies as was necessary for undergoing a strict trial.' We doubt whether such an excuse would satisfy the Civil Service Commissioners, or even the present Examinators for the Faculty of Advocates. Little is known of Crossrig, who was made an Ordinary Lord in November 1689, except in connection with the great fire which took place in Edinburgh in 1700. The whole of his title-deeds having been burnt, he presented a petition to Parliament, praying them to pass an Act for proving the tenor thereof. The prayer of the petition was granted, and an Act passed in compliance with it (1701, c. 17), which occupies ten double-columned folio pages of Thomson's edition of the Scottish Acts. In the preamble of the Act the following narrative of the fire occurs:—

'On the 3d of Febr. last, there broke out in the Meal Mercat of this city a most dreadfull conflagration, to the destruction in a few hours of the most beautifull fabrics thereof; the said Sir David having his lodging immediately above Mr John Buchan's house, where the fire began, and where it had made such progress before he knew thereof, that the first thing he saw after his advertisement was the flames coming out at Mr John Buchan's windows, so that he had scarce time to escape with the lives of his familie, many of them being in bed, whereby he hath sustained a great loss, not only of his furniture and library, but in the destruction of his own papers, and other papers of his friends and relations whereof he had the custody.'

President Forbes of Culloden's account of the fire is so interesting

as to be well worth quotation. In a letter to his brother, Colonel Forbes, he writes :—

‘Edin. 6 Feby. 1700.—Upon Saturday’s night, by ten o’clock, a fyre burst out in Mr John Buchan’s closet window, towards the Meall Mercate. It continued whill eleven a clock of the day with the greatest frayor and vehemency that ever I saw fyre do, notwithstanding that I saw London burne.

‘Ther are burnt, by the easiest computation, betwixt 3 and 400 familys : all the pryde of Edenr. is sunk ; from the Cowgate to the High Street all is burnt, and hardly one stone left upon another. The Commissioner, President of the Parliament, President of the Session, the Bank, most of the Lords, Lawyers, and Clerks, were all burnt, and many good and great familys. It’s said just now by Sr. John Cochran and Jordanhill, that ther is more rent burnt in this fyre then the whole city of Glasgow will amount to. The Parliament House very hardly escapt ; all Registers confounded ; Clerks Chambers, and processes, in such a confusion, that the Lords and Officers of State are just now mett at Rosse’s Taverne, in order to adjourneing of the Session by reason of the dissorder. Few people are lost, if any att all ; but ther was neither heart nor hand left amongst them for saveing from the fyre, nor a drop of water in the Cisternes : twenty thousand hands flitting their trash they know not wher, and hardly .20 at work. These babells, of ten and fourteen story high, are down to the ground, and ther fall’s very terrible. Many rueful spectacles, such as Corserig naked, with a child under his oxter, happing for his lyffe ; the Fish Mercate, and all from the Cow Gate to Pett Street’s Close, are still burneing. This Epitome of dissolution I send you, without saying any more, but that the Lord is angry with us, and I see no intercessor.’—(*Culloden Papers*, p. 27.)

Crossrig died in 1707.

SIR JOHN LAUDER of Fountainhall, one of the most eminent of our Scottish lawyers, was born in 1646. After studying Civil Law for several years at Poitiers, Leyden, and other places, he was admitted advocate in 1668. In 1669 he married a daughter of the well-known Sir Andrew Ramsay, Provost of Edinburgh, through whose influence he was appointed one of the assessors for the city. Sir John was all along opposed to the Stuart Government, but he was not a man to act violently in support of his opinions. He was one of Argyle’s counsel in 1681, and incurred the displeasure of the Court for the part he took in the defence of that nobleman. In 1685 he was elected as the Commissioner for the county of Haddington, which he continued to represent down to 1707. In April 1686 he became so obnoxious to the Government that he was threatened with imprisonment and seizure of his papers ; threats, however, which were not put in force. At the Revolution he was appointed an Ordinary Lord, and took his seat as Lord Fountainhall on 1st November 1689. In 1692 the office of Lord Advocate was offered to him ; but he declined to accept, because, it is said, he made it a stipulation, if he took it, he should be at liberty to prosecute those who were concerned in the massacre of Glencoe. It did not suit the Government

to accede to the stipulation, and the office, in consequence, was given to Sir James Stewart. Throughout the debates on the Union, Sir John Lauder belonged to the party denominated the 'Patriots,' and he frequently protested against what he considered the improper concessions made to England in various of the Articles. It is chiefly, however, on account of his 'Decisions' that Fountainhall is known. These were published in two folio volumes in 1759 and 1761; and, besides containing most admirable reports of the cases decided in all the Supreme Courts of Scotland from 1678 to 1712, they are interspersed with a vast amount of historical matter and anecdotes of the times told in the most interesting and racy manner. In addition to the 'Decisions,' Fountainhall wrote 'Historical Observes of Memorable Occurrences in Church and State, from October 1680 to April 1686,' which were published in 1840 by the Bannatyne Club. The same learned society published in 1848, under the title of 'Historical Notices of Scottish Affairs,' those portions of the 'Decisions' which concern the historian rather than the lawyer. Forbes, in his Preface to the Journal of the Session (p. xliv.), says of Fountainhall:—

'The publick and private character of this excellent judge are now so well known, that I need say no more of him than that he signalized himself as a good patriot and true Protestant in the Parliament of 1686, in defence of the penal laws against Popery. This self-denied man hath taken no less pains to shun places that were in his offer than some others have been at to get into preferment: Witness his refusing to accept a patent, in the year 1692, to be King's Advocate; and the resigning his place of a Lord of Justiciary after the Union, which her Majesty with reluctancy took off his hand. In short, his Lordship is (what I know by experience) as communicative as he is universally learned and knowing.'

When Lord Kames was admitted advocate, Fountainhall was still on the bench; and Lord Woodhouselee has accordingly given a short sketch of him, characterized by all that author's taste and truthfulness:—

'Sir John Lauder of Fountainhall,' he writes (Life of Lord Kames, i. 44), 'was a profound lawyer, and a man of considerable learning and knowledge of human nature; having read much, and studied the character of mankind. As a judge, he applied himself with indefatigable assiduity to the discharge of his official duties; and has left a very honourable memorial of his talents and industry in his collection of "Decisions," which record the proceedings of the Court of Session from 1678 to 1712, and incidentally note the transactions of the Privy Council of Scotland, with those of the Courts of Justiciary and Exchequer—a work compiled with so pleasing a mixture of the anecdotes of the times, and so much characteristic ingenuity of observation, as to render its perusal agreeable even to the general reader, and valuable to the historian, independent of its utility to the professional lawyer.'

Sir John was twice married. His first wife dying on 27th Feb-

ruary 1686, he thus records his grief:—‘ At night happened *mors carissimæ meæ conjugis mihi amarissima et luctuosissima*.’ Like many other despairing widowers, he married again in twelve months. He died himself in 1722.


SIR WILLIAM ANSTRUTHER of Anstruther, after sitting in Parliament for several years as Commissioner for Fife, and taking an active part in public business, was appointed an Ordinary Lord in 1689, and took his seat when the bench was reconstituted after the Revolution. He got from Queen Anne a gift of the highly important heritable office of one of the royal ‘ *Cibo cidæ* or Carvers,’ and was also made Master of the Household. Sir William was of a literary and philosophical turn, and published in 1701 a volume of ‘ *Essays Moral and Divine*.’ Campbell, in his ‘ *History of Scottish Poetry*’ (p. 141), says, his friends did everything they could to dissuade him from giving the work to the world. Sir William, on the contrary, speaks in his preface of the ‘ motive which made him yield to the importunity of my friends in exposing these *Essays* to the publick view.’ The *Essays* are very miscellaneous, and, it cannot be denied, justify Campbell’s statement rather than their author’s own just quoted. They are five in number: Against Atheism,—Of Providence,—Of Learning and Religion,—Of Trifling Studies, Stage Plays, and Romances,—Upon the Incarnation and Redemption. Sir William, however, did not feel himself at all tightly bound by the natural limits of his subjects, but wandered over every unlikely field of remark, stringing together his inconsequential thoughts in the most singular manner. It would be impossible, without a far larger citation than our space will allow, to do full justice to his style either of thought or language. We can only find room for one or two sentences, which are about the best in the book. In his ‘ *Discourse on Trifling Studies*,’ etc. (*Essays*, p. 155), Anstruther says :—

‘ Woman hath much more exact symmetry and harmony in her composition, of a more excellent form and shape, of a more mild and modest disposition, generally than men ; which we may attribute to the excellency of her plastick origine, for man was formed immediately of the dust of the earth, but woman of that refinement. But some may say, she was composed only of that *crooked* part of man his *ribb*, which makes her ever since have such a curvity and perverseness in their nature. Which as one tells us,

“ And of that crooked shapeless thing did frame
 The world’s great plague, and did it Woman name.”

Sir William died in 1711.

SIR ARCHIBALD HOPE of Rankeillor was admitted advocate in 1664. He was one of those who left the bar on account of the dispute about the right to appeal, but was readmitted in 1676. In 1681 Sir Archibald was called before the Council for 'absence from the host' in 1679. Fountainhall describes the proceedings thus (i. 146): 'Mr Archibald Hope of Rankeillor, advocate, because he had voted against the Duke and the court faction in the election of the Commissioners for Fife, is pursued before the Privy Council for absence from the King's host at Bothwell Bridge; against which he proponed on his privileges as an advocate (of which exemption, see in March 1680), and that he sent a man and horse for him. The Privy Council repelled this, so that out of pique the advocates' privileges were at this time subverted and overthrown. But they remitted to a committee to consider how far his sending a horseman should alleviate.' The passage referred to by Fountainhall, under date March 1680, is so curious that we quote it.

'March 6, 1680.—At the Criminal Court some heritors of the three Lothians were panned for absence from the King's host. . . . In Mr William Chiesly's case, as heritor of Cowburn, the defence of his being a member of the College of Justice was proponed, to exeem him from personal attendance at the King's host, and was repelled, as I hear; but it was neither fully debate, nor the Acts in their favours shown; and therefore the Criminal Lords continued the diet against Mr Thomas Learmont, Mr James Hunter, and the other advocates, who were conveyened for their absence, and had got indictments and citations for that effect, and they forbore to insist against them. It may be *alledged* for advocates, that they are not obliged to attend hosts and raids, and a man in arms for them, and ought not to be pursued for absence therefrom: 1^{mo}, Because the Roman law exeems and privileges them *ab omnibus functionibus provincialibus*, ll. 3. & 6. *C. de advocat. dir. jud. et tot. tit. C. de professor. et medicis*; *immo ab excubiis*, as Gothofred there affirms. 2^{do}, They are liberate by an express Act of Sederunt made by the Duke of Chaltelheraut, Governor in 1545. 3^{tio}, In June last the Lords sat all the time of the raid and campaign, and so advocates could not warrantably desert their clients' affairs, contrary to their oath *de fidei*, and of attending the Lords. 4^{to}, By acts of secret Council then made, the College of Justice were listed into a company to help to guard the town of Edinburgh, and they chused their captain, lieutenant, and other officers, and got arms from the Castle, and marched, and drew up, and used discipline.  *Nota*.—This makes not against the College of Justice, for Mr William Chiesly is deprived from being a writer to the signet.'—(*Fountainhall*, i. 99.)

There would thus appear to have been a corps of Devil's Own nearly two centuries ago. So fashions revolve in cycles, the duration of which is uncertain, but their return sure. In America at the present day, similar questions to that raised in Hope's case must arise. We doubt, however, whether Mr Lincoln would hold the members of the various Northern bars exempt from the operation of the Militia Draft Act on the authority of the title of the *Code de*

advocat. div. jud. The age of privileges is past, at least among our American cousins.

Sir Archibald was appointed an ordinary Lord in 1689, and after discharging his judicial duties with great assiduity and ability, died in 1706.

Sir WILLIAM HAMILTON of Whitelaw was admitted advocate in 1664. With the rest, he absented himself on account of the dispute about the Appeals, but was readmitted in 1676. He was made an Ordinary Lord in 1693, and Justice-Clerk in 1704. All contemporary writers admit that Hamilton was a man of great abilities; but somehow he failed to gain the good-will even of that party which he most zealously supported. When Dalrymple of North Berwick was made President, in 1698, Hamilton expected to have got the Chair, through the influence of Lord Tullibardine, and was grievously disappointed that he did not obtain it. Sir James Stewart, then Lord Advocate, in a letter to Carstairs (State Papers, p. 339), says that Lord Tullibardine complained to him that he had been the means of defeating his endeavours to procure the presidency for Lord Whitelaw.

‘As for L. Whitelaw,’ Sir James continues, ‘I told him my esteem of his abilities, and that when at London I had said freely to his Lordship that I desired not the Chair, and that Sir James’ (Ogilvie, afterwards Earl of Seafield) ‘could witness for me, that I had not solicit him against Whitlaw: but his Lordship knew well enough where that matter stuck, and that I was not to be charged with it; and all I had said as to the Session was, and would say it still, that the Session needed a ballance; and that though the L. Whitlaw were in the lowest seat of the bench, he was too strong. So he asked me how I would ballance it? I said, I was not to advise in it, but thought Commiss. Dalrymple a verie able man; and he also commended him. But, says I, my L. Whitlaw has himself most to blame; and for me, I have endeavoured to serve the King faithfully, and would do so, while he allows me: And as to all others, I was for living and let live, and wish’t that great men would live in peace.’

Stewart belonged to the same party with Hamilton, and his testimony is therefore the more trustworthy. The following character by Lockhart (Memoirs, i. 107) is no doubt too highly coloured; for Lockhart was a keen partisan, and had no love for Lord Whitelaw or any of his friends:—

‘He was bred a lawyer, and after the Revolution raised to the bench, upon account of his Whiggery and disloyalty. He soon displayed a froward, haughty mind. Betwixt man and man, wherein he had no particular concern, he was just; but extremely partial where his friend or his own politics interfered. He has a sound, solid judgment; but all his actions were accompanied with so much pride, vanity, ill-nature, and severity, that he was odious to everybody. He gloried in his malice to the Royal family, and was a great promoter of the Hanoverian succession.’

A poet (?) of similar feelings with Lockhart's has thus commemorated Lord Whitelaw's death, which took place in 1704 (Scottish Pasquils, p. 73) :—

' Old Nick was in want of a lawyer in hell,
To preside o'er the Court there, of Session ;
So old Whytlaw he took, for he suited him well,
For tyranny, lust, and oppression.
'Twixt the devil and Whytlaw, the poor wretches damn'd
Will be sore put about in that hot land ;
For now the fierce Justice-Clerk's got the command,
They could hardly be worse off in Scotland.'

NOTES ON THE LEGISLATION OF THE YEAR.

ALTHOUGH containing nothing which the most ultra-conservative could describe as an innovation on the established laws of the country, the statute book of this year includes a considerable number of enactments, chiefly of an administrative and economical character, which extend to Scotland, and which may claim some little share of attention from the legal profession. Among the statutes possessing a more general interest, we must not omit to notice the new Act for the Incorporation, Regulation, and Winding up of Trading Companies and other Associations, 25 and 26 Vict., cap. 89. This Act is mainly a consolidation of the last Joint Stock Companies Act, with the various supplementary enactments on the same subject, and the more general provisions of the statutes regulating the constitution of banking and insurance companies. We shall avail ourselves of the opportunity presented by the appearance of this useful measure, to sketch the features of that new code of partnership law, the growth of recent years, which has now assumed a systematic and, we may hope, a permanent form. The subject, however, is too extensive to be dealt with in the limits of a single article ; and for the present we shall confine our attention to such other materials as the legislation of the session presents for review.

An Act to amend the General Pier and Harbour Act, 1861.—(25 Vict., cap. 19.)

An Act to amend 'The Merchant Shipping Act, 1854,' 'The Merchant Shipping Amendment Act, 1855,' and 'The Customs Consolidation Act, 1853.'—(25 and 26 Vict., cap. 63.)

The statutes, the titles of which are affixed, are examples of a class of enactments which have been rendered necessary by the

extension of commerce, and which are every year becoming more numerous. The object of the Pier and Harbour Amendment Act is to give additional facilities for the construction and improvement of harbour accommodation, with particular reference to works of this nature undertaken by private associations. As usual in this class of enactments, the administrative powers requisite for the protection of the public interests are vested in the Board of Trade. The Act contains a variety of provisions relative to notices and the deposit of plans and sections, which must be studied by the legal advisers of the promoters of the associations to which we have referred; but the details are not generally interesting, and we do not propose to refer to its provisions more particularly.

The new Merchant Shipping Act forms a rather bulky supplement to the existing legislation on the subject. Its minute and complex provisions, together with those of its congeners, must, we should think, be a source of considerable embarrassment to persons connected with the shipping interest. We believe, however, that the legislation relative to this subject has, on the whole, worked well,—a conclusion which might safely be drawn from the diminution of litigation on subjects connected with maritime jurisprudence, in spite of the constant increase in the shipping trade. In our supplementary reprint of the statutes applicable to Scotland, we have included those parts of the new Act which relate to jurisdiction and process; and it will be sufficient here to indicate in a general way the scope of those provisions. Section 49 extends the summary jurisdiction in salvage cases, conferred by the principal Act upon the Justices of Peace and County and Sheriff Courts, to all cases in which the value of the property saved does not exceed L.1000, whether the salvage service has been rendered within the limits of the United Kingdom or elsewhere. Her Majesty's Secretaries of State are charged with the duty of prescribing the scale of costs to be awarded in such cases,—a power which might, we think, have been more appropriately conferred upon the judges of the Superior Courts in the different parts of the United Kingdom. Section 50 provides for the judicial valuation of wrecks. Section 51 gives the Lord Ordinary officiating on the Bills during vacation the same jurisdiction which, by the principal Act (section 468), was conferred upon the Court of Session in its Divisions; and in the two succeeding sections provision is made for the custody and ultimate disposal

of unclaimed wrecks. Sections 54 to 56 treat of the liability of shipowners. By these clauses, the liability of owners, in respect of loss of life or personal injury, is limited to a sum corresponding to L.15 per ton of the ship's tonnage; and in respect of damage to ships or cargo, arising from improper navigation or other fault of the master, to an aggregate amount not exceeding L.8 on the tonnage. Insurances effected against casualties resulting from improper navigation are declared not to be invalid by reason of the nature of the risk.

The most important clauses, in a legal aspect, are sections 66-77, relating to the delivery of goods, and the shipowner's lien for freight. In the event of the owner or consignee failing to apply for or take delivery of the goods, the shipowner is entitled, upon giving certain notices, to land the goods and store them in a wharf or warehouse at the expense of the owner, and by so doing does not forfeit his lien for the freight. The owner may, however, obtain possession of his property at any time, on making a deposit with the wharfinger or warehouse-owner, to cover freight and expenses of storage, and thereby throw upon the shipowner the onus of taking proceedings for the recovery of the sum alleged to be due. If, on the other hand, no deposit is made, and no settlement is effected, the warehouse-owner is authorized, after three months, or earlier if the goods are of a perishable nature, to sell by public auction so much of the goods as may be necessary to satisfy his rent and charges.

An Act to amend the Acts for the regulation of Public Houses in Scotland (25 and 26 Vict., cap. 35).

For the purpose of this notice it will be sufficient to indicate the objects of the Act without entering upon a detailed examination of the clauses. The first twelve clauses relate to the granting of certificates for licences; the powers of the Justices, in this respect, being enlarged, while at the same time provision is made for enabling the neighbours and residents within the district in which any licence is demanded, to state objections after giving notice to the applicant. Sections 13-20 provide for the suppression of unlicensed traffic in spirits and other exciseable liquors. Some of the powers conferred with that object are sufficiently arbitrary. For example, section 20 empowers any Justice or Magistrate, upon the oath of an informer, to grant warrant to any serjeant or superior officer of police, to search any specified house or place for exciseable liquors, 'and if

the same be found in such house or place exceeding one gallon, to seize such exciseable liquors, together with the vessel or vessels in which the same are contained,' such warrant to continue in force for one month. Incredible as it may appear, the Statute goes on to declare that the person occupying or using the premises where such liquor shall be found as aforesaid, shall thereby be guilty of an offence punishable by a fine of L.5, with the alternative of thirty days imprisonment. The offence, be it observed, consists in the fact of possession of a gallon of any exciseable liquor, coupled with an oath of credulity by an informer that exciseable liquors are trafficked in within the house. No evidence of actual trafficking appears to be requisite. There is no reason to apprehend that the extraordinary powers conferred by this section will be used for the annoyance of private individuals. Nevertheless, as the Act stands, it is in the power of any totally-abstaining Justice of the Peace to grant warrant to a police officer to break open his neighbour's wine-cellar; and if six bottles of wine are found therein, to convict the owner of an offence punishable by fine and imprisonment.

The next four sections are concerned with the punishment of the drunk and disorderly—a class of persons who have hitherto been regarded as patients, for whom lodging and medical attendance was to be provided at the public expense, but who are now very properly relegated to the class of offenders against public order, and made amenable to punishment.

The remaining sections of the Act provide for the prosecution and conviction of offenders against its provisions, and those of the Hume Drummond, and Forbes Mackenzie, Acts. Several of the defects and ambiguities in the procedure clauses of the older statutes are rectified; and, on the whole, it may be expected that this class of prosecutions, so necessary for the protection of the revenue and the preservation of decorum, will now be carried through with safety and certainty, and the public prosecutor relieved from the risk of impending actions of damages, which, as the law formerly stood, tended to discourage prosecutions. The form of review provided by the 33d section deserves commendation as an improvement upon the narrow and jealous exclusion clauses of previous statutes. The appeal is to be to the Circuit Court of Justiciary; or, where there are no Circuits, to the High Court at Edinburgh. But, instead of referring to the Act of George II., it is left to the Court of Justiciary itself to prescribe rules for the conduct of its proceed-



ings. The grounds upon which a conviction may be appealed are corruption or malice, and oppression, or such deviations in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done; *not* 'such deviations as have taken place *wilfully*, and as the Court shall think,' etc, which has been the usual style in previous enactments. The last ground of appeal appears to be sufficient to enable the Court to take cognizance of any question of law arising upon a conviction under the statute; and this is as extensive a jurisdiction as the public have any interest in reserving to the Appellate Court.

An Act to remove doubts concerning, and to amend the Law relating to, the private estates of Her Majesty, Her heirs and successors (25 and 26 Vict., cap. 37).

The immediate cause for legislation in relation to the private estates of the Crown in Scotland was the necessity of providing for the completion of a title to Balmoral and other heritable property in Scotland, belonging to the late Prince Consort, and to which it is understood her Majesty has succeeded as disponee. Since the time of the Stuarts none of the sovereigns of Great Britain have acquired any private estates in Scotland; and, accordingly, while no doubt could exist as to the right of the Sovereign to hold property of any description beneficially, it is not surprising, looking to the extensive changes affecting the feudal law which had taken place in the interval, that some uncertainty should have been felt regarding the mode of vesting heritable estate in the person of the Sovereign, in such a manner as to prevent the property from merging into the public estate of the Crown, which, as is well known, cannot be gratuitously alienated without the authority of Parliament. The dicta of Erskine and Bankton on the subject are unsatisfactory; and as if to add to the confusion, it appears that by an Act passed at the commencement of the present reign, 1 and 2 Vict., cap. 95, the original Act of Queen Anne, prohibiting alienation of Crown Estates had been extended to Scotland without reference to two subsequent statutes of George III. and George IV., whereby the power of disposal of the private estates of the Sovereign was reserved.

The statute under consideration, begins by rectifying the blunder committed by the draughtsman of the Act of 1st Victoria, and then makes provision for the completion of titles to the Crown's private estates. Such private estates of her Majesty as are held *feudally*

under the Crown as superior, may be held of her Majesty, her heirs or successors as Sovereigns and feudal superiors, and the dominium utile thereof shall not thereby become consolidated with the dominium directum (section 4). Estates held under subject superiors and lease-hold estates may be held by her Majesty through the intervention of a trust (sections 3 and 4). Her Majesty's private estates in Scotland may be disposed of by general or special disposition, deed of appointment, power of attorney, etc., executed under the sign manual, and attested by two witnesses (section 6). Other clauses provide for the settlement of Crown property by will, its descent by legal succession, and its liability to taxation. Finally, by section 11 it is declared that all suits and actions respecting such estates as may not be vested in a trustee or trustees, may be sued in Scotland in the name of a person to be appointed for that purpose, such appointment to continue during her Majesty's pleasure.

An Act to make farther Provision respecting Lunacy in Scotland
(25 and 56 Victoria, cap. 54).

The provisions of this statute are supplementary to those of the Lunacy Act 20 and 21 Viot., cap. 71, as amended by 21 and 22 Vict., cap. 89. It is perhaps to be regretted that the author of the supplementary Act had not taken the safe course of incorporating the new enactments with the old, and thus embodying in one measure a comprehensive code for the regulation of asylums and the treatment of the insane. Acts of Parliament the administration of which is confided to professional lawyers, may be patched up by successive amendments; and however intricate, perplexing and inconsistent may be the sum of legislation on the matter, the judge or prosecutor, as the case may be, is expected to make the material workable. It is his business to evoke harmony and consistency from the legislative chaos; and if he fail in the attempt, as men endowed with less than creative genius will fail, he need expect no sympathy from the non-professional public. These lunacy statutes, however, stand in a different position. To a very large extent, the administration of the law under their provisions devolves upon physicians, keepers of asylums, and the relatives of the insane. The former class are prevented by considerations of expense from availing themselves of legal advice in the performance of those delicate duties which belong to the daily routine of their

profession. The latter naturally feel themselves precluded, in many instances, by motives of delicacy, from resorting to the assistance of their legal advisers. And yet, in either case, a very trifling deviation from, or misinterpretation of the statutory enactments may subject the individual to heavy penalties, or even to the more vexatious and expensive calamity of an action of damages for false imprisonment. With the view of making the law as simple and as intelligible as it is possible to make it, we would suggest that in the event of any farther amendments being required, the whole statutory law in relation to lunacy should be consolidated, after which no farther alterations should be admitted except in the form of a new code embodying the necessary changes.

Sections 2–5 embrace some additional provisions relative to the licensing of private asylums and houses of detention for lunatics, and lunatic wards in poorhouses. Section 6, we presume, is intended to give facilities for the treatment of persons who were at one time called drunkards, but who, by a refinement of professional phraseology, are now termed dipsomaniacs. It provides that any person desirous of being received into an asylum or licenced house may obtain admission on making a voluntary application to the Sheriff of the county, backed by a medical certificate that his treatment there would be beneficial, and a written consent by the superintendent of the establishment to receive him. The superintendent is bound, under a penalty of L.50, to make a report to the Sheriff once a month upon the case of any person so admitted, stating his opinion as to the sanity of the individual, and the expediency of his being detained. Such persons are to be at liberty to depart at any time, unless the superintendent shall certify to the Sheriff ‘that he considers such person to be in a state of mind dangerous to himself or others,’—a somewhat ambiguous statement, and one which, we should imagine, would cause considerable embarrassment to an honest medical superintendent; while, to a keeper of elastic conscience, it would furnish an excuse for detaining any patient for any length of time that might be prompted by his own interest, or the easily excited apprehension of the friends of the inmate.

Sections 8–12 relate to the mode of providing accommodation for the insane in the different parochial, district, and county divisions, and give powers to the District Boards to acquire land under the compulsory provisions of the Lands Clauses Consolidation Act.

Section 14 repeals the 34th section of the General Act, and prescribes a new form of procedure for the reception of lunatics. The order of admission is to be granted upon a subscribed petition, accompanied by a schedule of particulars, and supported by certificates from two medical persons, one of whom may be the medical superintendent or consulting or assistant physician of any public asylum. Superintendents are authorized to receive and detain for three days, without an order from any Sheriff, any person whose case is duly certified to be one of emergency by a qualified physician. Section 15 repeals the provisions of the principal Act relative to the commitment of dangerous lunatics, and substitutes other provisions. Section 16 empowers the General Board to authorize the removal or transfer of lunatics from asylums, etc., by special order; and section 17 imposes upon superintendents the duty of taking measures for the liberation of patients who have recovered so far as to render their liberation expedient. The remaining sections relate to the transfer and liberation of lunatics detained at the instance of Parochial Boards under the sentence of Courts of Justice.

An Act for Amending the Law relating to Copyright in Works of the Fine Arts, and for Repressing the Commission of Fraud in the Production and Sale of such Works (25 & 26 Vict., cap 68).

Hitherto the law of copyright in works of art has rested upon two old statutes, 8 Geo. II., cap. 13, and 7 Geo. III., cap. 38. The first of these statutes was passed mainly for the purpose of giving a copyright to the widow of Hogarth in the engravings of that master, its provisions being afterwards extended and made perpetual by the second statute to which we have referred. By these Acts the copying or imitating of engravings, whether from original designs or not, was in effect declared to be a civil wrong, punishable by pecuniary penalties and forfeiture of the pirated plate and impression. The enactment was defective, in that it required the name of the engraver and date of publication to be attached to all published impressions, thereby withholding protection against the copying of proofs before letters. It has been doubted, moreover, whether the enactment prohibited copying in a different character,—*e.g.*, copying engravings by photography or in colours,—a doubt which was not wholly removed by the statute of Victoria. The subsequent Act of 17 Geo. III., cap. 23, secured to the artist the right to prevent multiplication of copies of his design without his consent; but it has

been doubted whether the provisions of the statute would apply after the design had already been made public, the decisions in reference to book-copyright being adverse to the notion of a copyright existing at common law after publication.

The present enactment does not directly remedy the defects in the statutes of Geo. III., but enables the publisher of a new engraving to protect himself, by obtaining from the artist an assignment of the copyright of the original design. Section 1 gives a copyright in original works of art (including photographs) to the author for life, and for seven years after his death. Section 2 saves the right to depict the same objects or scenes. Sections 3, 4, and 5, regulate the registration of copyrights in works of art, and the form of assignment and transfer. Section 6 imposes a penalty of ten pounds for every act done in infringement of the right given by previous sections; while section 8 defines and prescribes the penalties applicable to the new offence of fraudulently affixing any name, initials, or monogram to a work of art, not being the production of the party whose signature is affixed. The four subsequent sections regulate the form of procedure for the recovery of penalties, and reserve the right of the injured party to seek redress by an action of damages.

An Act to facilitate the Transmission of Moveable Property in Scotland (25 and 26 Victoria, cap. 85).

By the operation of the Lands Transference Acts of 1847, and subsequent enactments, the forms of conveyances have been so simplified and shortened, that it was matter of common remark, that a conveyance of a large estate might be expressed in fewer words than a deed of assignation of a policy of insurance or a moveable bond. The object of the Act, the title of which is prefixed, is of course to extend the system of abbreviated clauses already in operation in conveyances of land rights, to deeds affecting moveable property.

Section 1 prescribes a short form of assignation of personal bonds or conveyances of moveable estate,—the word conveyance being interpreted by section 4, so as to include every description of moveable right. It is farther provided by section 1, that assignations, in the prescribed form, may be endorsed on the conveyance itself, and that a stamped assignation, so endorsed, shall have the same effect as one executed according to the form at present in use.

Section 2 regulates the intimation of assignments. Under its provisions it is now sufficient that the holder of the assignment or his agent should transmit a certified copy by post to the debtor, whose written acknowledgment of receipt shall be sufficient evidence of intimation. Under the common law rules, it was considered by conveyancers that an acknowledgment of intimation must be express, and that acknowledgment of the receipt of a copy of the assignment was not legally equivalent to an acknowledgment that intimation had been made. This defect in the law of intimation is therefore rectified. If the party to whom a certified copy has been sent declines to acknowledge the receipt of it, it would seem that notarial intimation will still be requisite in order to transfer the property.

Section 3 reserves the right to use existing forms. Section 4, besides giving a general interpretation to the word 'conveyance,' makes the word 'assignment' include translations and retrocessions, and probative extracts thereof; and, with superfluous caution, makes the words 'moveable estate,' include debts and obligations as well as other personal property.

An Act to amend the law relating to the Fraudulent Marking of Merchandise (25 and 26 Victoria, cap. 88).

After defining the words 'mark,' and 'trade mark,' and explaining what was surely already self-evident, that the Sheriff or Sheriff-substitute in Scotland is a 'Court,' the statute goes on to declare, section 2, with a variation of phraseology which we need not repeat, that every person counterfeiting, with a fraudulent intention, a trade mark of any other person, is guilty of a misdemeanour (in Scotland a crime and offence); and that every article to which the fraudulent mark has been applied, shall be forfeited to her Majesty. The 3d clause, which seems to have been inserted in the interest of Messrs Bass and Allsop, imposes the same penalty upon persons applying counterfeit marks to any cask, bottle, stopper, vessel, etc., in which any article of merchandise shall be sold. The selling of articles, with false or forged trade-marks, after the 31st December 1863, exposes the seller, by section 4, to a penalty of L.5, plus the value of the article sold. Counterfeit imitations and alterations of trade-marks, are, by section 5, to be deemed counterfeit marks within the meaning of the Act, if made with intent to defraud. Section 6

provides for the discovery and disclosure of information regarding the manufacture of such counterfeits. Sections 7–9 are designed to put a stop to a practice which is said to be customary in many branches of trade, of marking a false indication of the quantity upon articles sold by weight or measure. As the prohibition only extends to cases of fraudulent intention,—and as in the class of cases to which we refer there is no such intention, and, in point of fact, no one is deceived,—it may be doubted if this enactment is likely to prove efficacious. It would be absurd, for example, to prosecute under these sections for selling as a quart bottle of liquor a bottle of the usual size, which, in fact, only contains about the sixth part of a gallon. The remaining clauses of the Act are chiefly occupied with provisions regarding the prosecution of offenders and the recovery of penalties in the English and Irish Courts. Nothing is said as to Scotch procedure, beyond the complimentary recognition of the Sheriff as a judicial officer, to which we have already adverted. It may, therefore, be assumed that criminal prosecutions in Scotland will fall to be instituted by the Lord Advocate or Procurator Fiscal of the county; and that penalties may be sued for in Scotland in an ordinary action, and subject to the same regulations respecting finality and the right of appeal, which obtain in other branches of civil procedure.

English Cases.

BANKRUPT.—The granting of a bill of sale is not an act of bankruptcy, where there is nothing to show that the assignee did not, under the circumstances, receive a fair equivalent for the goods and property assigned by the bill of sale, or to show that the transaction was intended to defeat and delay creditors. Although power is reserved to the Court to draw inferences of fact, they cannot be called upon to find, as a matter of fact, that the transaction was a fraud. Blackburn, J.: *Hutton v. Cruttwell* is a distinct authority upon this part of the case. Lord Campbell, in delivering the judgment of the Court, said: 'We think that there ought not to be any rule granted in this case. The jury found that the deed relied upon was not fraudulent, nor executed in contemplation of bankruptcy. . . . There having been an agreement, before the money was advanced, that the security should be given, and the money having been advanced under this agreement, the deed is to have the same effect as if it had been executed in April 1851, instead of the month of June following. So far this is the case of a bill of sale *bona fide* given to secure an advance made on the faith of the security, to enable a trader to carry on his business; and it is well established law that such a bill of sale is not an act of bankruptcy, although it would be an act of bankruptcy if the consideration were wholly or partly an antecedent debt, contracted without security.'—(*Whitmore v. Claridge*, 31 L. J., Q. B. 141.)

BARON AND FEME.—A married woman is subject to an attachment on an *ex parte* application, if, upon an order obtained by herself, she omit to put in her separate answer.—(*Home v. Patrick*, 31 L. J., Ch. 424.)

RATES.—Under two local Acts of Parliament, by which the rates of a parish were regulated, an appeal was given against any rate to the next Quarter Sessions, and it was to be enforced by summons before two Justices, who were to order the payment, and (if necessary) grant a warrant of distress, if the person summoned 'did not prove to them that he was not chargeable with or liable to pay such rate.' It was held, this only gave the Justices a power similar to that in enforcing a poor-rate, and that they had no jurisdiction to inquire into the validity of a rate, good on the face of it, and that they had no jurisdiction to 'determine' anything 'in a summary way,' within 20 & 21 Vict., c. 43, so as to give power to state a case under that Act.—(*Ex parte May*, 31 L. J., M. Ca. 161.)

BILL OF LADING.—A number of bags of grain, all bearing the same mark, but some weighing 12 stone and some 8 stone, were shipped on board indiscriminately, and the master signed two bills of lading, each for a portion of them, one of which, the plaintiff's, was for a certain number, at a certain total gross weight, which by computation would not exactly tally with a uniform weight either of 8 stone or of 12 stone, but nearly corresponding with the latter, the larger weight; and the master delivered the right number of bags, falling short of the gross total weight by several tons. It was held, *per* Pollock, C.B., and Wilde, B., that the master was not responsible to the owner for the deficiency; and, *per* Bramwell, B., and Channell, B., that he was responsible. Bramwell, B.: It may be that in some cases the captain could not distinguish which part of a shipment is to satisfy one bill of lading and which another, and it may be that in such cases he would well be warranted in refusing to sign two bills of lading—as, if two casks with no marks were delivered, and he was called on to sign two bills of lading, one for a cask of beer brewed by A., another for a cask brewed by B., with nothing to distinguish which was which; but if he does sign two bills of lading, and especially if he can distinguish which part of a mixed parcel of goods applies to one bill of lading and which to another, he must deliver the goods accordingly. The shipper has a right to expect that a captain will so deliver when he signs two bills, and he cannot be heard to say I did not attend to it, or think of it, or cannot do it without taking some pains, and so I will not. The captain, if he objects, should object when the bills of lading are tendered to him for signature. . . . Wilde, B.: What would be the particular working of a rule which casts on the master the duty of weighing packages of various sizes until he had made the right weight out of the right number of packages? On this subject a most important admission was made at the trial, namely, that 'no weighing ever takes place on board ship.' Such is the present practice. How far will a decision that this duty is cast on the master in future be compatible with the means at his command, or the expeditious discharge of the ship?—(*Bradley v. Dunipace*, 31 L. J., Ex. 210.)

VOLUNTARY SETTLEMENT.—A. and his wife, in exercise of a general power of appointment, reserved to them in a voluntary settlement executed after marriage, appointed certain lands after the death of the survivor of them to trustees, their executors, administrators, and assigns, upon trusts for sale, and to divide the proceeds of such sale among the seven children of A. and B. A. and B. both died. Upon a bill by six of their children against the heir-at-law of A., who was entitled in default of appointment, it was held, that such heir-at-law was a trustee for the benefit of the parties interested under the appointment.—(*Dilrow v. Bone*, 31 L. J., Ch. 417.)

NEGLIGENCE.—Non-liability of owner of a house for injury by the negligent conduct of a builder employed by him. Pollock, C. B.: Where a thing is in itself a nuisance, and must be prejudicial, the party who employs another to do it is responsible for all the consequences that may have arisen; but when the

mischief arises not from the thing itself, but from the mode in which it is done, then the person ordering it is not responsible, unless the relation of master and servant can be established. On these grounds the rule must be discharged.—(*Butler v. Hunter*, 31 L. J., Exch. 214.)

APPRENTICE.—Liability of infant apprentice to serve his master's executors. By an indenture of apprenticeship, J. C., an infant, with the consent of his father, put himself apprentice for seven years to T. S. of W., lockmaker, his executors and administrators, such executors or administrators carrying on the same trade or business, and in the town of W., for seven years; and T. S., in consideration of the services of his said apprentice, agreed to teach and instruct him, or cause him to be taught and instructed, in the art of a lockmaker, during the said term, and to pay the apprentice certain weekly wages. Held, that the apprentice was bound to serve the executrix of S., his widow, who carried on her husband's business at W., and that the executrix was bound to teach him.—(*Cooper v. Simmons*, 31 L. J., Exch. 232, M. C. 138.)

EXECUTORS.—One of several executors, contrary to the wishes of the others, compromised a debt of their testator, from which a benefit might result to himself. Upon a bill by his co-executors, held, the compromise was not binding on the estate of testator, and that it must be set aside. The Master of the Rolls: Executors could not be compelled to act in unity; each might plead separate pleas; still, where an action was brought, the principle always acted on in such cases was, that the Court would take the plea most advantageous for the testator's estate. The agreement, however, which had been made was rather a release or an arrangement made by one executor on behalf of the others, for the benefit of the testator's estate. The arrangement was made between parties who knew that the assent of two of the executors could not be obtained. It was impossible to say that it could affect the testator's estate.—(*Stott v. Lord*, 31 L. J., Ch. 391.)

NEGLIGENCE.—The workmen employed in a Government dockyard were permitted to cross a certain yard to go to the water-closets erected for their accommodation. A Government contractor, by permission of the Government, had erected machinery in the aforesaid yard. A revolving shaft, a portion of this machinery, was so placed as to cross the shortest and most convenient way to these water-closets. The shaft was partially covered, but not concealed, by planks, and was found by the jury to have been 'insufficiently covered.' There were other, though not shorter or more convenient, ways to these water-closets. Plaintiff, a workman employed in the dockyard, but not by the contractor who had erected the machinery, in going to the water-closet, accidentally fell near the shaft, which caught his arm and severely injured him. In an action against the contractor to recover damages for the injury, it was held, that plaintiff's right to cross the yard was only the right not to be treated as a trespasser for so doing, and that defendant was under no obligation to fence the machinery at all, and therefore not liable for insufficiently fencing it, and that the action was not maintainable. *Semble*—That if the fencing to the machinery had been apparently sufficient, or the machinery had been concealed from view, or there had been anything in the nature of a 'trap,' as explained in *Corby v. Hill*, defendant would have been liable. *Martin, B.*: The right that plaintiff had to pass over that part of the yard was a right by *licence*, and not of *right*. If I avail myself of permission to cross a man's land, I do so in the exercise of a licence, and not a right. The only right I acquire is the right of not being treated as a trespasser. The plaintiff had the option of going one of two ways, this being one; he voluntarily chose this, and he has no right of action against the defendant because the way is out of order, and he ought to have been non-suited at the trial.—(*Bolch v. Smith*, 31 L. J., Ex. 201.)

HIGHWAY.—Where an ordinary highway runs between fences, one on each side, the right of passage which the public have along it extends *prima facie*, and unless there be evidence to the contrary, over the whole space between the fences; and the public are entitled to the use of the entire space. A permanent

obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law; and where defendants, for the purposes of profit to themselves, placed telegraph posts upon a highway, with the object and intention of keeping them there permanently, and did permanently keep them there, such posts being of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot-passengers, it was held, that the defendants were liable to be found guilty. Also, that if the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or if sufficient space was left for the public traffic, the defendants were still liable to conviction.—(*R. v. The United Kingdom Electric Telegraph Co. (Limited)*, 31 L. J., M. Ca. 166.)

HIGHWAY.—Upon the trial of an indictment for making a tramway upon and along a public highway in the parish of L., the jury found that accidents had happened in consequence of the tramway being laid down; that the tramway was a nuisance, an obstruction in a substantial degree of the ordinary use of the highway for carriages and horses, and that it rendered the highway unsafe and inconvenient in a substantial degree. Defendants proposed to offer evidence to show that a great number of persons were carried along the tramway; that a saving of money was effected thereby; that the tramway was not a nuisance or an obstruction, and that it was a great advantage to the public in general who used the highway. But it was held, the finding of the jury amounted to a verdict of guilty, and that the evidence tendered by defendants was inadmissible. The tramway was laid down under a contract entered into by one of the defendants with the vestry of L., in pursuance of resolutions which were passed by the vestry; but it was held, the laying down the tramway could not be said to be a paving or repairing of the street within the Metropolis Local Management Act.—(*R. v. Train*, 31 L. J., M. Ca. 169.)

SALE.—Plaintiff wrote to A., offering to purchase of him a horse at a certain price, and saying that if he heard nothing further he should assume that A. accepted the horse. He did hear nothing further, until after a sale by auction had taken place, when both A. and defendant, who was auctioneer at the sale, wrote to plaintiff to say that the horse had been sold at the sale by mistake, and expressing their regret at the occurrence. In an action by plaintiff against defendant for the conversion of the horse, it was held that as there was no memorandum in writing binding on A. in existence at the time of the sale, the property in the horse had not then vested in the plaintiff, and that he could not rely on the subsequent letter of A., as that would not relate back so as to complete the plaintiff's title at the time in question.—(*Felthouse v. Bindley*, 31 L. J., C. P. 204.)

MARINE INSURANCE.—S., a shipbroker, was directed by plaintiff, a shipowner, who was liable for loss by jettison, to take out an open policy against jettison on deck goods, and S., shortly afterwards, received from plaintiff a notice declaring the shipment to be on deck per *La Plata*, from Grimsby to Ostend, of certain specified goods. S. not being then able to effect such a policy as plaintiff required, caused a declaration as to the risk insured against, similar to the notice which he had so received from plaintiff to be indorsed on a general policy, which had been effected a month previously by S.'s agents in their own names, and in that of any other person to whom it might appertain, from any port on the east coast of Great Britain to any port on the Continent between Hamburg and Havre, upon any kind of goods, 'to be valued and declared as interest might appear.' Defendant underwrote this policy, and also put his initials to such declaration. There were other goods in other vessels belonging to other persons, in which the plaintiff had no interest, also declared by indorsement on the policy. Plaintiff was duly informed by S., that the risk by the *La Plata* had been covered not upon plaintiff's own policy, but on S.'s general one. It was held, plaintiff could not sue defendant on such policy, as it had never been made

with plaintiff, nor with any one on his behalf, nor had it ever been ratified by him. *Quære*, whether S. could sue on it as trustee for the plaintiff. Keating, J. : Mercantile usage, though always treated by the Courts with deference, must not contradict any known rule of law. Now, to give effect to the usage here, if any such exists, which would enable the plaintiff to maintain this action, would be to allow a party to sue on a contract which had not been made by him, or by any one on his behalf, or had even been ratified by him. If it should be considered necessary that such right to sue should exist, the Legislature must be applied to on the subject, as was done in the case of the transfer of bills of lading.—(*Watson v. Swann*, 31 L. J., C.P. 210.)

CONTRACT.—Plaintiff, having travelled to London by defendants' railway, left a box at the cloak-room of the station, paying 2d. for booking, and received a ticket, on which was the condition that defendants would not deliver up luggage deposited without production of the ticket. Plaintiff called the next (Sunday) evening with the ticket, but there was no one in attendance; and after waiting some time, plaintiff went to another part of the station, found an attendant, and so obtained his box: he was thus delayed forty minutes. The cloak-room on week-days was practically open all day, but on Sunday only a few minutes before and after trains arrived; but plaintiff was not aware of this. Plaintiff having brought an action for damages caused by this delay, in which he obtained a verdict for 40s. of damages, it was held that the ticket being silent on the subject, the contract by defendants was to re-deliver the box within a reasonable time after a reasonable demand; that whether there had been unreasonable delay, under the circumstances, was a question for the jury alone, and that there was evidence which ought to be left to them.—(*Stallard v. The Great Western Railway Company*, 31 L. J., Q. B. 137.)

PARTNERS.—Statements by one of two persons that another is his partner, he not being so in fact, will not be evidence to render the other liable as an ostensible partner, the statements not having been made to the person who seeks to render the other liable, and not having come to his knowledge as a matter of notoriety, and it not being shown that he has acted on the faith of such statements. Pollock, C. B. : It was said that Thompson, the person who undoubtedly carried on the business, had stated that the other defendant was a partner, and that this was evidence against the latter so as to constitute him a partner, and that this would be a sort of holding out by one party to render the other liable. But we are of opinion, and it is quite clear, that the agreement did not constitute a partnership, and that there was no evidence of any holding out which was shown to have reached the plaintiff; and the statement by Thompson, that the defendant Blakey was a partner, did not at all affect the defendant Blakey so as to make him liable to the present claim.—(*Edmundson v. Thompson*, 31 L. J., Ex. 207.)

DOMICIL—ADMINISTRATION.—Held by Lords Cranworth and Chelmsford (*dis*, the Lord Chancellor), that while the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death, the duty of administering personal estate in this country is to be discharged by the Courts of this country, though, in the performance of that duty, they will be guided by the law of the domicile. The Lord Chancellor: To the Court of the domicile belong the interpretation and construction of the will of the testator. To determine who are the next of kin, or heirs of the personal estate of the testator, is the prerogative of the judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort. To these general rules must be added a remark on the great danger and inexpediency of the Court of a foreign country taking upon itself the task of interpreting the will of a testator, which is written not in the language of that country, but in the language of the country of the domicile. I entirely adopt upon this point the language of Lord

Lyndhurst, in advising your Lordships in the case of *Trotter v. Trotter*, 3 Wils. and S. 407. I am therefore of opinion that the executors might have excepted to the jurisdiction of the Court of Chancery as a Court of construction and administration. Lord Cranworth: In every case the succession to the property will be regulated not according to the law of this country, but to that of the domicile. The duty of administration is to be discharged by the Courts of this country; though, in the performance of that duty, they will be guided by the law of the domicile. This was the mode in which the law was laid down by Lord Cottenham in this House, in the case of *Preston v. Lord Melville*, 2 Rob. Ap. Ca. 88. Lord Chelmsford: The fund is within the jurisdiction of the Court; the rights of the parties according to the law of the domicile (assuming an intestacy) have been ascertained; the next of kin are for the most part in this country; and why, under these circumstances, the property should be remitted to the forum of the domicile, in order that it should be sent back again to be distributed, and why the Court should be incompetent to act effectively and finally in the suit which has been instituted, by decreeing a distribution among the several persons entitled, and transmitting to Russia the shares of the next of kin resident there, I am unable to comprehend.—(*Enohin v. Wylie*, 31 L. J., Ch. 402.)

WILL.—Testator, a native of Great Britain, domiciled in Russia, and possessed of real and personal property in that country, and also of a large sum of consols in the English funds, made his will in the Russian form, which commenced with the words: 'I dispose of all my moveable and immoveable property, honestly acquired by myself, in the following manner;' and after directing a sale of his real estate, proceeded—'The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided into ten equal parts;' and after disposing thereof and appointing executors, in conclusion contained the following words—'and as all my moveable and immoveable property is mine own, and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same under any pretence whatever; and likewise, no one has a right to interfere with or contest the proceedings and dispositions of my executors.' It was held by the House of Lords, affirming the decision of the Lords Justices and of Vice-Chancellor Wood, that the testator died intestate as to his beneficial interest in the English funds.—(*Enohin v. Wylie*, 31 L. J., Ch. 402.)

MERCHANT SHIPPING ACT.—A seaman's share of salvage cannot be recovered by action from the owner or captain of his vessel, although the salvage claimed shall have been paid by the owners of the vessel saved to the owner of the salvor. All questions relating to salvage, both as regards the amount due in respect of services rendered, and the apportionment of such amount among the different classes of salvors, are within the jurisdiction of the Court of Admiralty, subject to the provisions of 'The Merchant Shipping Act, 1854.' Where the sum claimed as salvage is under L.200, and any dispute arises thereon, such dispute must be referred to two Justices of the Peace, as provided by sections 460–3 of that statute. An offer to pay a sum less than the sum claimed, if not accepted, is no evidence against a defendant in an action for a larger sum, on a count for money had and received to the plaintiff's use, or on an account stated.—(*Atkinson v. Woodall*, 31 L. J., M. Ca. 174.)

BILL OF LADING.—An indorsee of a bill of lading, who has indorsed the same over before the arrival of the vessel and delivery of the cargo, does not, under the 18 & 19 Vict., c. 111, s. 1 (the Bills of Lading Act), remain liable for the freight. Erle, C. J.: It is proposed to read this section as meaning that because the consignor remains always liable for the freight, and the assignee of the bill of lading has had transferred to him by the statute the liability of the consignor, such assignee is to remain liable, although he has passed away the goods and bill of lading to a third party. I think the consequences this would lead

to are so monstrous, as to make me pause before I adopt such a construction of the statute. The party who receives cargo is considered generally to be liable for the freight, but that is under an implied contract, arising from the fact of his receiving the cargo, and not from the bill of lading. I think the meaning of the statute is, that the assignee of the bill of lading who receives the cargo shall have all the rights and liabilities of the contracting party; but that if he assigns the bill of lading before the arrival of the cargo, he parts with all such liabilities.—(*Smurthwaite v. Wilkins*, 31 L. J., C. P. 214.)

ARBITRATION.—The Court of Chancery referred to arbitration certain matters in dispute between parties to the suit of *H. v. H.*, and also between the same parties as to the estate of *H.*, the testator in the cause; those disputes related to certain collieries, their management, and the dealings with them for many years. One of the parties had a son, who was well acquainted with the mining accounts, and had assisted his father in the business, and this party applied to the arbitrator to allow his son to be present; but that officer refused to permit him to be present, on the ground of his behaviour in the matter. A shorthand writer, whose presence the same party wished to take notes at the meetings, was also excluded. After the award, a motion was made to set it aside; and it was held, that, without going into the question whether the award did or did not do substantial justice between the parties, it must be set aside, the exclusion by the arbitrator of the son and the shorthand writer having been made without adequate ground, and the acquiescence of the party complaining in the proceedings under the reference after their exclusion, not being such as to deprive him of his right to have the award set aside. Observations on the duties of arbitrators, and on their power to delegate authority. Lord Justice Turner: It is to be observed in the first place, that an arbitrator being a judge selected by the parties, and chosen to decide without appeal, this Court has nothing to do with any mere error of judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination; and by that determination, if fairly and properly made, they must be content to be bound. But, on the other hand, arbitrators, like other judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this Court, when called upon to review their proceedings, is bound to see that those rules have been observed. . . . I think that before an arbitrator excludes any one from attending on behalf of any of the parties interested, he is bound to ascertain that there is good reason for the exclusion, and to take the best care he can that the party who is affected by the exclusion is not prejudiced by it.—(*In re Haigh's Estate: Haigh v. Haigh*, 31 L. J., Ch. 420.)

VENDOR AND PURCHASER.—A purchaser in fee of a piece of land cannot, by the purchase of a lease granted of the same land, avoid covenants which his vendor had taken from his tenants over a wide area in aid of covenants which he had entered into with third parties.—(*Jay v. Richardson*, 31 L. J., Ch. 398.)

NOTICE OF ACTION.—In pursuance of a resolution at a parish vestry, that it would be advantageous if a weighing-machine were erected to check the weight of materials purchased for the highways, the surveyors appointed under the Highway Act, 5 & 6 Will. IV., c. 50, caused a machine to be placed in the highway; and it was held, that although the statute gave no express power to erect weighing-machines, the surveyors were acting in pursuance of the Act, so as to entitle them, under section 109, to notice of an action brought for injuries sustained in driving over a heap of earth excavated for the weighing-machine.—(*Hardwick v. Moss*, 31 L. J., Ex. 205.)

THE

JOURNAL OF JURISPRUDENCE.

THE SANDYFORD MURDER CASE, AND CRIMINAL LAW ADMINISTRATION.

It was our intention to have referred in our last number to a case which has attracted an unusually large share of public attention and anxiety, and which, interesting as it was when regarded as a problem in the law of evidence, is also suggestive of considerations bearing upon the administration of our system of criminal investigation; and upon the means which our code of criminal justice has provided for the obtaining of redress, in the event of any accidental miscarriage in the course of criminal proceedings. Up to the time of publication the case was still under consideration in the Home Office; and, as it was understood that a further investigation would be instituted, we were under the necessity of postponing our observations until the issue of the inquiry. That inquiry has been completed; and the favourable result of the appeal to the Royal prerogative having now been communicated to the public, the case is at once removed from the arena of popular discussion, and may be considered with the calmness befitting the discussion of professional topics. We do not propose, however, to enter upon the merits of the issue presented to the Glasgow jury, of which probably our readers have heard enough ere this; but will confine our remarks to the questions of professional interest to which we have alluded. These relate, (1) to the abuse of the power of examining prisoners upon declaration, of which the preliminary examination in Mrs McLachlan's case presents a flagrant example; (2) to the expediency of vesting in the Court of Justiciary the power of removing cases from the circuit towns to Edinburgh, upon the application of the prisoner; (3) to the admitted inadequacy of our machinery of

criminal justice to deal with cases which contain other elements than those which are peculiarly fitted for the cognizance of a jury.

1. It will be in the recollection of our readers, that, among other points unsuccessfully urged on behalf of Mrs M'Lachlan, objections were strongly pressed by her counsel to the admissibility of the prisoner's declarations, on the ground of the undue pressure to which she had been subjected on her examination before Sheriff Strathern; and also on the ground that the Procurator-Fiscal had possessed himself of information for the purpose of cross-examining the prisoner and entrapping her into admissions, by the illegal expedient of apprehending her husband without any probable cause of suspicion, and then inducing him to give evidence, under the guise of a declaration, which he could not have been asked to give upon precognition. The objections were certainly deserving of a more attentive consideration than they appear to have received. Whether well-founded or not, in the sense in which they were pleaded, *i.e.*, as affecting the admissibility of the declarations, there can be no doubt that they were substantial objections. It is impossible to approve of the method of examination which appears to have become the practice in Glasgow, and under which the idea of a declaration, as a spontaneous or voluntary statement of the prisoner, is entirely lost sight of. These observations will not appear too strong when we mention that, in the case under consideration, the unfortunate prisoner was brought up for examination, at the instance of the Procurator-Fiscal, no less than three times; on one of which occasions she was subjected to examination for nearly four hours. Of course, no opportunity of consulting with friends was afforded, either before or during the inquisition. The objects of the examination appear to have been two. Lord Deas explains one of them, which is common to all such examinations. 'One great object,' said his Lordship, 'is to allow the prisoner an opportunity, if the prisoner thinks proper, to make some explanation of the circumstances which may seem to weigh against her.' This we had hitherto understood to be the only object of such examinations; but in this case at least there would appear to have been another great object. What this was, Lord Deas failed to explain, but it may be easily gathered from the circumstances. We regret to say that it appears to have been nothing else but to lead the prisoner into falsehoods with the effect, if not for the purpose, of destroying her credit on every point. How skilfully this object was attained, may be seen from the following

specimen. Certain articles of dress belonging to the murdered person had been traced to the possession of the accused. In ordinary circumstances, the prisoner would have been shown these articles, and would have been asked to explain how they came into her possession. The Glasgow officials, over-anxious in their duties, have another mode of proceeding; and they preferred to try the experiment of concealing for a while the recovery of the articles, to see whether the woman would be weak enough to endeavour to conceal what, if divulged, would weigh heavily against her. The declaration on this point thus commences (in answer, be it remembered, to questions):—

‘I know that the late Jessie M’Pherson had a black watered silk dress. She had another dress of silk, of a changing colour, with flounces, but with cotton cloth beneath. She had also a velvet cloak, the front of which was lined with blue silk; as also a drab cloth cloak. She had also a black dyed harness plaid. I do not know if she had a black silk polka, but she told me she had one. The other articles of dress I have seen. I have not seen any of these articles of dress lately, either in her possession or anywhere else.’

The experiment, it will be seen, is entirely successful. The prisoner believes the articles still to be secreted, and, as might have been anticipated, she lies. She may now be confounded by being confronted with them. This is accordingly done; and, when she sees she can no longer deny the possession, she gives her explanation of how she came to have them:—

‘Being shown two silk dresses having a sealed label attached, as also two cloaks having a sealed label attached, as also a black dyed plaid having a sealed label attached, as also a piece of twilled cotton cloth having a sealed label attached, I declare I know the said dresses, cloaks, and plaid to be Jessie M’Pherson’s, and are the same which I have before mentioned. I do not know the twilled cloth. I am shown a japanned tin box with sealed label attached. I declare that box is mine. I despatched to Ayr, either on Tuesday or Wednesday, the 8th or 9th of this month, the said tin box, containing the said dresses, cloaks, and plaid, wrapped in the said cotton cloth, by the Ayr Railway, from Glasgow, and addressed to Mrs Darnley, Ayr; to lie till called for. On Friday, the 4th July, the late Jessie M’Pherson sent down said dresses, cloaks, and plaid to my house by a little girl whose name I do not know, but who was accustomed to clean knives for her.’

This style of examination is altogether unworthy. Why not have shown the prisoner the articles at once, and have taken her explanation, if that was desired? The lie which she was induced to tell was of no consequence to the case, except for the purpose of throwing discredit on her. Whether innocent or guilty, nine prisoners out of ten were certain to prefer resorting to deception rather than volunteer information as to a fact which they would find great difficulty in explaining. Fortunately, examinations in this manner

are rare ; but why Lord Deas should have passed these declarations without animadversion, is not very apparent. That he would not have been justified in withholding them altogether from the jury, may perhaps be admitted ; but a vicious practice in a matter of criminal investigation was certainly a fair subject for criticism by the superior wisdom of the principal court of judicature. We confess that, rather than see such a style of examination introduced and sanctioned by the *non repugnantia* of the Court, we should greatly prefer that the examination of prisoners should be conducted in open court, as in France, with all those protections which the impartial position of the examiner, and publicity, can give.

2. What occurred before the trial, taken in connection with its result, suggests the propriety of giving prisoners a right to move that the trial should take place before the High Court of Justiciary, in preference to the Circuit Court. The Crown possesses the power of thus removing trials from beyond the influence of local prejudice ; and, though Crown counsel use the power whenever they think that it will tend to the furtherance of justice, the present case is a proof that they may sometimes fail to exercise it in circumstances where its exercise is desirable. The excitement on the subject of this case in Glasgow, before the trial, was intense. It was discussed everywhere ; and every scrap of information, however procured and from whatever source, was eagerly canvassed. To meet the demand for information, the Glasgow press seems to have toiled indefatigably. Reporters followed the tracks of the criminal officers, waylaid every individual that looked like a witness, peered into anything that looked like a production, overheard conversations, and enacted as diligently as they could the part of spy on investigations which the policy of our law has appointed to be kept secret. Materials thus obtained could form no safe ground of judgment ; and if this restless curiosity were to be frequently exhibited, it would become a question whether our secret system of criminal investigation ought to be continued. If the public is to come to a conclusion in such cases before the trial, it would certainly be better that it should have reliable information, such as would be afforded by a public investigation, rather than that the fate of a prisoner should be prejudged on unfounded rumours or the loosest hearsay evidence. The present case, however, was of so peculiar a character, that curiosity to learn its details, and eager discussion of these details when learned, were unavoidable. The fault was not with the inhabitants of Glasgow, who just acted as the

inhabitants of every large town in the midst of which an extraordinary murder had been committed would have acted, nor with the newspaper press, but with the advisers of the Crown in permitting the case to be tried on the spot. The effect of the previous discussions the case had received, was well seen at the end of the trial.

The examination of the witnesses lasted three days; each of the counsel spoke between two and three hours; to sum up the delicate circumstantial evidence occupied the judge some four hours; and how long will it be believed that it took the jury to consider the depositions, the arguments, and the careful charge? Just nineteen minutes—a time which they might reasonably have taken had the case been one of the clearest ever presented to a jury. It was hardly decent; and the natural conclusion is, that in the minds of the jury the case had been prejudged. The case was at best a very difficult case,—one which, by the public at least, has not been thought easy to resolve. It was a case of circumstantial evidence, in which many circumstances pointed to guilt, and some few but important circumstances to innocence. Either the jury had not kept their judgment in suspense till the end of the trial, or they were very ill-qualified for the duty which the logic of the ballot-box had cast upon them. An illustration more striking of the injustice of trying a case in a city where nearly every one had previously discussed it, and had arrived at a conclusion more or less distinct as to the guilt of the person to be tried, cannot well be conceived. That the Crown should have committed the mistake of trying the case on the spot, is easily enough accounted for; but our law is seriously defective in not giving a prisoner a remedy against such mistakes. It is said, and may easily be believed, that, had such a remedy been available, the advisers of the prisoner were most anxious to have used it. In England they would have had a remedy. The Court of Queen's Bench there has power, on the application of an accused party, to remove the indictment to the Central Criminal at London. (19 Vict., c. 16.) It is clear that some equivalent power ought to be conferred by the Legislature upon the judges of the High Court of Justiciary.

3. In consequence of the singular disclosure made by the prisoner after the verdict, and the very generally expressed desire that some further inquiry into the facts should be allowed, the Secretary of State, as is now well known, took the unusual, but, we think, very sensible course of remitting to a commissioner to take evidence upon

the spot, and to report his opinion upon the whole case for the guidance of the advisers of the Crown. As the inquiry was extrajudicial, its conduct necessarily devolved upon some leading member of the bar; and the selection of Mr Young for this responsible and somewhat delicate duty has naturally given general satisfaction. The appointment of a special commission, however, amounts by implication to an admission, on the part of the Executive, that the ordinary machinery of judicial procedure in Scotland is defective. The result of the remit is, that a sentence of the Supreme Court of Criminal Judicature is, in effect, reviewed by a member of the bar,—a result which cannot be altogether satisfactory to the learned judges, and which can only be justified by the felt necessity for further inquiry in the case. That necessity, however, has arisen from circumstances which are exceptional, but not anomalous; and unless we greatly mistake the temper of the public mind in relation to capital cases, the precedent established in Mrs M'Lachlan's case is likely to be made the ground for demanding a rehearing on many future occasions. Obviously, it will never do to control the action of the ordinary tribunals by the appointment of special and temporary commissions. It is equally clear that some constitutional means must be provided for securing to prisoners, tried on the issue of life and death, that benefit of appeal for which provision is anxiously made in statutes imposing penalties for petty offences, and which, in matters of civil process, is regarded as the constitutional right of the unsuccessful party.

What limits should be appointed to the process of review, whether it should embrace the right of moving for a new trial, or be confined to the determination of points of law reserved at the trial, are questions upon which we do not enter at present. We accept the admission—the practical admission of the Executive—that the absence of an appellate jurisdiction in this class of cases is a defect. This defect, during the parliamentary recess, could only be supplied by a singular and exceptional interference with the course of justice; but we trust that the Minister whose duty it is to present, for the consideration of Parliament, such improvements in the law as are demanded by public opinion, will take an early opportunity of introducing a suitable measure of criminal appeal, such as will at least place her Majesty's subjects in Scotland, in this respect, on a footing of equality with their countrymen south of the Tweed.

THE GAME LAWS.

(SECOND ARTICLE.)

IN our article in last month's journal, we pointed out several difficulties experienced under the Night Trespass Act. In the following remarks, we desire to call attention to a question which has frequently arisen under the Day Trespass Act (2 & 3 Will. IV., cap. 68), and which, we believe, has not yet been fairly and satisfactorily settled. We refer to the question, Whether a tenant, his family and servants, is liable to prosecution and conviction, under that statute, for trespassing in pursuit of game upon the farm on which they dwell.

We shall first examine the question in the light of the statutory enactment itself, irrespective of the decisions.

Let it be observed in the outset, that the offence under the statute is not simple trespass on *land*, but on *game*. The title of the Act is, 'For the more effectual prevention of trespasses upon property by persons in pursuit of game.' The expression 'trespass' is not necessarily to be understood in a technical sense, and the word 'property' may be supposed to be used demonstratively. The preamble sets forth that 'trespasses upon property by *persons unlawfully engaged in pursuit of game*, have recently become frequent in various parts of Scotland.' The first section proceeds by imposing a penalty against '*any person whatsoever* who shall commit *any* trespass, by *entering or being*, in the day-time, *upon any land without leave of the proprietor*, in search or pursuit of game,' etc. Here it will be noticed that the offender is described in general terms, '*any person whatsoever*;' and that the Act contemplates not only an *entry* on, but *being upon any land*. These words undoubtedly comprehend a tenant of, or resider on a farm; which is strengthened by the clause which alone negatives the trespass, being confined to the proprietor, and not extended to the occupant. So, if a tenant, without such leave, is found in pursuit of game on the farm of which he is occupant, he appears, according to these words, to fall within the category of a trespasser on the game.

It is instructive to contrast the phraseology of the Night Poaching Statute, 9 Geo. IV., cap. 69, with the subsequent Day Trespass Act. The former is not designated as a Trespass Act, but 'for the more effectual prevention of persons going armed by night for the destruction of game.' The first and leading clause is the 'unlawfully taking

or destroying any game or rabbits in any land, whether open or enclosed, or by night unlawfully entering or *being in any land*, whether open or enclosed, with any engine or instrument for the purpose of taking or destroying game.'

So far, then, the Day Trespass Act is adverse to the tenant and his household. But a difficulty is raised by a singular proviso appended to the first clause, and which is in the following words:— 'Provided always, that *any* person charged with *any* such trespass shall be at liberty to prove, by way of defence, *any* matter which would have been a defence to an action at law for such trespass.' It is, of course, open for a defender *to plead* any defence, however absurd and irrelevant; but, clearly, this provision must mean a defence which would *prevail* in such civil suit. If it be meant, that whoever could not be successfully prosecuted civilly, or interdicted from entering on land, may pursue game on such land, then tenants and their servants are certainly exempted from liability to the penalties of the statutes. But the words, '*such* trespass,' may be held to limit the trespass to one on the game, and not on the mere soil. If so, the clause is very unmeaning. At common law, a proprietor has no action against any party for trespassing *in pursuit of game*. Game is the property of the first occupant. The pursuit of it on the lands of another is a civil wrong, because in so doing the party makes use of lands which are the property of another,—not because the game itself is not a legitimate object of pursuit.

Another argument in favour of the exemption of the tenant and other residents on the farm, will be found in the second section, which authorizes the *occupier* of the lands, or any of his servants, to order trespassers off the lands, and in case of refusal, then to apprehend the reculant trespasser, and to seize any game he has in his possession. Unless, on the principle of 'setting a thief to catch a thief,' it is not easy to reconcile the notion of persons who are under the daily temptation of being themselves trespassers on game, being recognised as the statutory detectives of trespasses by exotics. The legislature could never mean that a tenant or occupant, or even his servants, should be ordered to leave their farm, and be liable to be taken into custody if they refused to leave. Still more absurd is the reading, that the tenant, occupant, or his servants, are thus to order themselves to be ejected from their place of residence.

But the construction which would exempt the tenant from liability to the penalties of a trespasser, is materially strengthened by the

terms of section 16, which, by way of explanation or restriction of the provision before quoted, attached to the first and leading section, and of section 12, requiring the defender to prove leave of the proprietor, proceeds to declare 'that nothing in this Act contained shall prevent any person from proceeding, by way of *civil* action, to recover damages in respect of any trespass upon *his land*, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of this Act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass *by any person at whose instance*, or with whose concurrence or consent, such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence to this purpose and effect.' It is obvious that no action for damage to crops or fences could be maintained, save by the tenant of the farm; and as the Day Trespass Act does not in the first and leading section provide for a prosecutor, but in the second clause the right of prosecution is given to the owner and *occupier* of the lands, it seems to follow, that the tenant may prosecute under the first section for the simple trespass, and consequently that he himself cannot be among the class of trespassers. It will also be observed that the provision as to prosecution is extended to the occupier, who may not be the tenant, but the mere manager, grieve, or servant of the proprietor, or tenant of the farm.

The question is rendered more difficult by the fact that *rabbits*, under the name of conies, are expressly enumerated as game in the statute. It had, previous to the statute, been unanimously held by the Court that rabbits were *not* game, and that the tenant was entitled to kill them without leave of his landlord. 13 Feb. 1828, *Sir David Moncrieff v. Arnott*. The authority of this decision, however, has since been much doubted, especially in the case of *Porter*, to be afterwards noticed. In the Night Trespass Act, '*rabbits*' are expressly mentioned in addition to 'game;' and which last is in its turn very particularly enumerated by a separate section. In the Revenue statute, requiring game certificates, 52 Geo. III., c. 93, rabbits are for the first time exalted to the rank of game alongst with their feathered congeners, 'woodcocks, quails, snipes, and landrails.' Unless the Day Trespass Act is to be held as setting aside the decision in the case of *Sir David Moncrieff*, and, for the purposes of the statute, making

rabbits game under the scriptural appellation of 'conies,' it would seem to follow, that though a tenant might be held a trespasser on his own lands in pursuit of other kinds of game, he would be exempt from the penalty if he confined his attentions to the pursuit of the rabbit species. In more than one late case, tenants, and persons employed by them to kill rabbits, have been found not liable in the penalty for want of game certificate; and in several counties, justices of the peace have refused to convict as trespassers persons shooting or killing rabbits on a farm, with leave of the tenant thereof. But in the case of *Porter* (to be afterwards mentioned), the Court confirmed the conviction of the brother of a tenant for shooting rabbits on his brother's farm, with leave of the tenant.

So far we have examined the question by the light of the statute alone. There are several reported decisions applicable to this point; but it cannot be said that they have altogether removed the difficulties which surround it.

The first case is that of *Smellie v. Lockhart*, 1 June 1844, 2 Brown 194. Smellie was convicted under the statute, at the instance of the proprietor, for trespass on lands which *were set forth in the complaint* as tenanted by himself and his father. The kind of game with which he interfered, or whether it was rabbits alone, does not appear from the report. In a suspension the conviction was quashed, but by the narrowest majority. The Lord President (Boyle), Lord Justice-Clerk (Hope), Lords Moncreiff and Cockburn, were of the majority; Lords Mackenzie, Medwyn, and Wood were for sustaining the conviction. It is of importance to notice that, whilst the judges in the majority dealt only with the case of a tenant, the judges in the minority expressed opinions that the same exemption, if good for the tenant, must necessarily be extended to those who had right to be on the land. Lord Medwyn observed: 'If the tenant is allowed to escape from the penalties of this statute, on the same principle immunity must be granted to farm servants, or persons possessing servitudes over lands, and all others who have a lawful right to enter the lands.' The plea, that there was no review on the merits—the same being expressly excluded by the 15th section—was disregarded. Per Lord Justice-General: 'Where it is stated in the complaint that the individual accused of trespassing was tenant of the lands, I cannot hold this to be part of the proof to the effect of excluding our review. This fundamental fact is set forth on the face of the proceedings, and we cannot disregard it.'

The question next arose in the case of *The Earl of Selkirk v. Kennedy*, 14 Dec. 1850—Shaw's Justiciary Reports, 463. The defender in this case was a servant on the farm on which the trespass was alleged to have been committed. His plea in bar of the action was sustained by the justices. It is not shown from the very meagre report, whether the fact of his being a servant appeared on the face of the complaint; but it does appear that no proof was taken by the justice. Lords Justice-Clerk (Hope), Moncreiff, and Ivory concurred in holding that 'the defence or objection stated for the respondent, as to the competency of proceeding against him as a trespasser under the statute libelled on, was ill-founded; and the Court remitted to the justices to recal the sentence, repel the objection to the competency of the complaint, and thereafter to proceed therein as accords with law.

The brother of a tenant was convicted by the justices of Kirkcudbrightshire, under the Day Trespass Act, *for shooting rabbits* on his brother's farm, though the leave of the tenant was proved. A suspension was refused. 'The Court were unanimously of opinion that the suspender's objections went to the import of the proof, which the Court were not entitled to look at under the provision of the statute. The justices must have been satisfied that it was witnessed that the suspender was on the farm in pursuit of *game*, and not merely of rabbits, and their decision was final.' The proof, however, as given in the report, merely shows that the defender had shot only one rabbit. 22 March 1858, *Porter v. Stewart*, 3 Irvine 57.

In the case, 13 Nov. 1854, *M'Gregor v. Latour*, 1 Irvine 579, a farm servant was convicted of trespass, under the Day Act, on the farm whereon, in the complaint, it was set forth he was a servant. The conviction was set aside on a point of form; but the non-applicability of the statute to tenants seems not even to have been pleaded.

The question next arose with a tenant under the Night Act, 9 Geo. IV., c. 69—8 March 1856, *Smith v. Young*, 2 Irvine 402. The fact of tenancy there appeared on the face of the complaint. Lords Cowan and Deas expressed an opinion that a tenant could not, even under that Act, be convicted of the mere trespass on his farm for the purpose of taking game. Lords Justice-Clerk (Hope), Handyside, and Ardmillan held that the Night Trespass statute applied to tenants; and this was affirmed in the decision. But the conviction was quashed, because of the omission to state that the defender had '*unlawfully* entered, or was on the lands.'

In *Mains v. Fraser*, 3 Irvine 538, a conviction under the Night Trespass Act was set aside as informal. It was observed by the Lord Justice-Clerk, 'the charge is one of *unlawfully* entering upon the public road. Now, that is not an offence at all. It is impossible that any one can unlawfully enter upon the public road, or the outlets or gates at the side of it, for the purpose of killing game or for any other purpose.'

The general question of tenant right was again raised on 15th Dec. 1859, *Earl of Kinnoul v. Todd*, 3 Irvine 501. The Lord Justice-General delivered the judgment of the seven judges, unanimously confirming the decision in the case of *Smellie*, and sustaining a decision of the Perthshire justices refusing to convict a tenant for trespass under the Day Act. Per Lord Justice-General: 'It does not appear that the case of *Kennedy*, in 1850, decided that in *all* circumstances a farm servant was *necessarily* a trespasser, in the sense of the statute, on the lands of which his master was tenant, but only that *he might* be a trespasser. That case did not raise any other question, and the Court sent it back to be proceeded with. We do not know what would have been the final result—what the final judgment of the justices was, or what would have been the judgment of this Court had it been shown that the servant had been on the lands in pursuit of his ordinary occupation, and in execution of the agricultural purposes of the tenant. Neither in the case of *Kennedy* or of *Smith* did the Court profess to derogate from the case of *Smellie*; on the contrary, in both of them the authority of the case of *Smellie* was recognised. As to the general argument submitted to us, we have found nothing in that argument which would induce us to depart from the judgment in *Smellie's* case.'

In *Raper v. Duff*, 3 Irvine 529, a farm servant was convicted under the Day Act, and the conviction was unanimously sustained. Per Lord Justice-Clerk: 'With regard to the first objection, that this is not a good charge as laid against a farm servant, it is sufficient to say that this point is ruled by the case of the *Earl of Selkirk v. Kennedy*; and that in the present case, the charge is properly and correctly stated, being in the very terms of the statute.'

From these decisions it may now be deduced—

First, That a tenant cannot be convicted for trespass in pursuit of game on his own farm. He, however, is liable to prosecution under other of the many statutes for protection of game.

Second, It is not decided whether one of the tenant's family, and his servants, resident on his farm, can, under all circumstances, be convicted under the statute for trespass in pursuit of game on the farm where they are residents. If the case of *Moncrieff v. Arnott* be held to rule that rabbits are not game at common law, it is still an open question whether a tenant may not authorize his servants, and even non-residents, to kill rabbits on his farm.

But the difficulty arises under the opinions expressed in the cases of *Smellie* and the *Earl of Kinnoul*. It appears that all that was decided in these cases was, that a tenant can under no circumstances be convicted under the Day Act for trespass on his farm; and perhaps under the opinions expressed in the case of *Smith and Young* it is not clear if he can even be convicted for the simple trespass under the Night Act. With regard to servants, all that the case of the *Earl of Selkirk* decided was, that they *may* be convicted under the Act if the proof satisfied the justices that they were in pursuit of game, though on the farm on which they reside. It would seem that if they are on a field in pursuit of their ordinary agricultural labour, then there is no trespass though game come in their way. In such case, the trespass is on the part of the unfortunate animal. If Hodge, whilst hoeing turnips, raises a hare from his resting-place, and mortally strikes him with his hoe, and captures his carcase, there is no offence under the statute; but if he sallies forth with gun or net to a field where he had no call to be, the trespass is committed. The distinction is somewhat nice and fanciful, but may safely be left to the county justices to define and apply. Whether their Honours convict or acquit on the evidence, that is a judgment on the merits which is impregnable from assault by any mode of review, and therefore the powerful motive of irresponsibility should at least lead to caution and mature deliberation. In any new code of game laws, it would be well, however, that all such wire-drawn distinctions were obliterated, and the law clearly expressed, so that it may be known who are and who are not within the range of the law and its penalties.

NOTES ON THE LAW OF JOINT STOCK COMPANIES.

(FIRST ARTICLE.)

ON THE LIABILITY OF INCORPORATED COMPANIES AT COMMON LAW.

THE question which we propose in this paper to consider, is chiefly interesting in its bearing upon the liability of the shareholders of banking and other companies, which have obtained the privilege of incorporation either by charter from the Crown, or under the authority of a special Act of Parliament. The powers of companies so situated, are regulated almost exclusively by their Deeds or Acts of Constitution; and the question of liability is perhaps the only *general* question capable of solution by direct appeal to legal principle, which the relations of those companies present for consideration. The interest of the proposed inquiry, regarded as a speculative question of jurisprudence, renders it a fitting topic of examination in these pages; while, from the insight which the argument affords into the real nature and position of mercantile corporations, the inquiry may be regarded as a natural and fitting introduction to the study of some of the more difficult questions upon the liability of partners under the statutes regulating the constitution of Joint Stock Companies.

The following propositions embody the conclusions to which the inquiry tends; and, accordingly, it will be our object to exhibit the authority and illustrate the principles upon which those conclusions are based:—

1. The Crown has, at common law, the right of granting charters of incorporation, not only to municipal bodies, and others of a similar nature, but also to trading companies.

2. The members of any corporation, of whatever nature, are exempt from individual liability for the debts of the corporation; on the principle that a charter of incorporation has the effect of erecting the company into a new person, absolutely independent of the individual corporators.

3. Corporations constituted by special Acts of Parliament, enjoy the same privileges as those which are constituted by royal charter.

As regards the last proposition, it is sufficient to observe, that an Act of Parliament (which implies the assent of the Crown) is capable of effecting whatever it professes to effect; and, therefore, assuming that incorporation has the effect of limiting liability

then, if Parliament says that a society 'shall be incorporated, it necessarily confers upon that society all the privileges of an incorporated society, created according to constitutional law; that is, created by a charter of erection emanating from the Crown.

4. In the view we take of the law of corporations, it is immaterial that the charter of incorporation does not contain a clause expressly exempting the shareholders from liability. The Crown cannot modify the rights and liabilities of partners at common law. It cannot declare that partners shall or shall not be liable. The exemption from liability is only an indirect result of the creation of a body politic, which it is the function of the Crown to create with all the powers and liabilities legally pertaining to such a body.

There is certainly a want of explicit statement regarding the liability of corporators in the early English authorities. Blackstone treats pretty fully of incorporations, and of their legal status; and the non-liability of the members, during the subsistence of the corporation, is an inference deducible from his remarks. In treating of the dissolution of corporations, he raises the question, whether there is recourse against the property of the individual members after dissolution, and arrives at the conclusion that there is no recourse except against the common stock. Modern writers state, without hesitation, that members of chartered companies are not individually liable. (Lindley on Partnership, 301; Wordsworth on Joint Stock Companies, 239-40.) After referring to 6 George IV., cap. 91, which empowers the Crown to grant charters under which the shareholders shall be individually liable, Mr Wordsworth observes—'And this power seems to have been required, because the Crown, at common law, could only grant a simple charter of incorporation, by which the company was the body dealt with by creditors, whose recourse was against the corporate property only, the members of the company being individually free from liability.' On this point we may also refer to the evidence given by Mr Belenden Kerr and Mr Hodgkin, barristers, before the Joint Stock Companies Committee, 1844. These gentlemen prepared or revised the statutes relative to banking and joint stock companies which were in force at that date; and it is evident from their very distinct evidence on the subject, that by both special attention had been given to the question of individual liability. In the appendix to the Committee's Report, there is a report by Mr Kerr to the Board of Trade on this very subject. Numerous allusions to the same principle

occur in the evidence taken by the Mercantile Law Commission of 1854; and it is assumed by the professional witnesses that the liability of members of English incorporated companies is limited.

The chief difficulty attending the solution of the question turns upon the extension to Scotland of the English doctrine of incorporation, in the absence of any clear authority in our own law. In adopting the view that the law of the two countries is identical, we rely, 1st, on the authority of our institutional writers; 2d, on the absence of any conflicting authority; 3d, on considerations derived from the theory of corporations; 4th, on the tacit assumption by the Legislature that the law is uniform, as evinced in all the British statutes relating to the subject.

In the doctrine of the English law there is nothing technical, or peculiar to that system of jurisprudence. The doctrine does not depend upon the authority of any decision, so far as we have been able to learn, but is simply a deduction from the legal view of a corporation as having an independent personality. Speaking of ordinary corporations in Scotland, as, for instance, municipal bodies and colleges, we see no reason to doubt that the principles of the English law would be directly applicable. Supposing the case of a Scotch municipal corporation becoming insolvent (a supposition which was actually realized not many years ago), it would be extravagant to maintain that the magistrates and town councillors could be rendered individually liable for the debts of the community. Now, assuming that the incorporating clauses of the Scotch bank charters are conceived in terms similar to those employed in granting corporate privileges to municipal corporations, colleges, etc.,—assuming, in short, that the Crown professes to do the same thing when it erects those various classes of institutions into bodies corporate, we are unable to discover any reason for the distinction which has been supposed to exist between the degree of liability incurred by the members of trading, as distinguished from non-trading, corporations.

Reverting now to the four sources of authority noticed in a previous paragraph:—

1 and 2. Stair treats very meagrely of the law of persons, and we have not been able to discover any reference to the law of corporations in his Institute. Erskine seems to have taken Blackstone as his guide. Like that author, he only treats of the liability of corporators after the company is dissolved, and asserts that the creditors have recourse only against the common good. Nor does he

advert to the distinction between corporations proper and chartered companies. Professor Bell (Com., 6th Ed. 240) asserts the doctrine of the non-liability of shareholders of chartered banks in explicit terms, resting his opinion on the broad ground that they are members of an incorporated society. Limited liability, in his view, seems to be identified with the idea of an incorporation, for he has not considered it necessary to pursue the argument further.

The only reported cases in the law of Scotland bearing at all upon the question, are those which relate to the liability of municipal corporations and road trustees.

The liability of public trustees acting under statutory authority was settled by the decisions of the House of Lords in *Duncan v. Findlater* and *The Ministers of Edinburgh v. The Magistrates*. In the first of these cases, it was decided that no claim lay against the trustees of a road trust in respect of an injury sustained by a private individual using the road (M'L. and Rob. 911, reversing 16 S. 1150; and see *New Clyde Shipping Co. v. River Clyde Trs.*, 4 D. 1521; *Higgins v. Livingstone*, 6 Pat. 244). In the second case (*Min. of Edinburgh v. The Mags. of Edinburgh*, 6 Bell 509; and see *Pearson v. Mags. of Montrose*, M. 13098; *Innes v. Mags. of Edinburgh*, M. 13189), it was ruled that the magistrates and town council were not liable in their corporate capacity to make reparation for the loss sustained by the ministers of the city, who were entitled to the proceeds of an assessment, in consequence of the magistrates having neglected to perform the duty of collecting the assessment in terms of their statutory powers. An opinion, however, was intimated, that the members of the corporation were responsible for the consequences of their personal negligence; and an opinion to a similar purport was intimated by Lord Cottenham in *Findlater's* case, subject to the observation that, while the trustees kept within their powers, they would not personally be liable for any damage which their acts might occasion to other persons.

3. In opposition to these distinct opinions, it has been suggested that it might be *ultra vires* of the Crown to limit the liability of the partners of companies to which corporate privileges have been granted. This seems to prove too much. Assume that the Crown could not introduce a clause for the benefit of the shareholders, in a question between them and the public. Still the law is, in England at least, that the act of incorporation does limit the liability of the

members by implication ; and therefore it must either be maintained that the Crown cannot incorporate a mercantile company to any effect (a view which is untenable, because the right in question has been repeatedly recognised by statute) ; or, if the right is admitted, the legal effect of incorporation must be determined as matter of law, rather than of constitutional right.

It has also been observed by an eminent equity lawyer, that where the Crown exceeds its powers, the courts of law may restrain the exercise of their prerogative. But the question of the liability of shareholders, as respects the construction of the Scotch bank charters at least, does not depend on the construction of any grant *per expressum* of peculiar privileges—for no grant of immunity from liability is contained in their deeds of title,—but on the construction of the ordinary formula of incorporation, which it is admittedly not *ultra vires* of the Crown to grant. Whatever effect the doctrine of partnership may have in modifying the rights of corporators *inter se*, where the corporation is also a mercantile firm, we do not think that doctrine can affect the question of liability to members of the public. If the public contract with a firm which possesses a corporate style and corporate privileges, they must be held to do so in the knowledge that they are dealing with that artificial person, the corporate body ; and there does not seem to be any room for the extension of the doctrine of constructive partnership to cases of this description. We may add, that while the English law of partnership is certainly not more favourable to exemption from individual responsibility than our own, the doctrine of the exemption of members of corporations from personal liability is admittedly extended by the interpreters of that law to all corporations, trading as well as to non-trading. As to joint stock companies not chartered, they are creatures of the statutory law, and no argument can be founded on the consideration of liability which the statutes attach to these institutions.

The provisions of the various banking and joint stock company statutes aid, or at least illustrate, this view of the question. Among these we notice, in the first place, the statute 6 Geo. I., cap. 18, which embraces two distinct measures, the first being the incorporation of the Royal Exchange Insurance Company and another company. The preamble declares, that the right of granting charters of incorporation belongs solely to the Crown ; and it recites the terms upon which the Crown has agreed to incorporate these bodies. The object of the enactment was to legalize the agreement made

betwixt the Crown and these companies, and also to give the companies something like a monopoly. Nothing is said about the liability of shareholders; but it appears from the evidence of Mr Latham, of the Bank of England (Report, Mercantile Law Commission, p. 130), that these two companies are considered to have their liability limited by the charter; and Mr Wordsworth (Law of Mining and Banking Companies) makes the same statement. This proves that, in the opinion of English lawyers, the Crown could and did, prior to the year 1825, the date of the first important change in this branch of the law, grant charters to mercantile companies which had the effect of limiting the liability of the shareholders.

Such was the state of the English law until the passing of the Act 6 Geo. IV., cap. 91, the second clause of which authorizes the Crown to grant charters, providing that the shareholders shall be personally liable under certain regulations and conditions. It is a mistake to suppose, as many have done, that the object of this enactment was to provide for the limitation of the liability of the shareholders of incorporated companies. The words at the end of the clause which have been thought susceptible of this construction, refer to regulations for ascertaining and enforcing the liability, and do not imply that it was to be limited in extent. The statute speaks of corporations generally, and not specially of trading companies. As the law of England then stood, members of *corporations* were exempt from personal liability. And when the statute says, in express terms, that it shall be lawful to the Crown, in granting charters, to declare that such members shall be personally liable (no matter under what regulations), we do not read that clause as one enabling the Crown to attach conditions to such charters which were already implied in all ordinary grants of incorporation. It is clear that the Crown was thereby authorized to do something which it was doubtful whether the Crown could otherwise have done; but that something was, we take it, not to grant immunity from liability, but to fix personal liability upon the members of chartered corporations in certain circumstances. This is also the view taken of the Act by Mr Wordsworth, in the passage already cited. The Act in question extends to Scotland; for it begins by repealing the 'Bubble Act,' 6 Geo. I., cap. 18, prohibiting the formation of private joint stock companies, which notoriously applied to the whole United Kingdom; and then it goes on to enact that shareholders may be made personally responsible, evidently with a view to put a restraint

on the management of joint stock companies, which were expected to spring up in consequence of the repeal of the penalties imposed by the Bubble Act. We conceive, therefore, that the doctrine of the personal liability of shareholders in chartered companies, in Scotland as well as in England, was introduced for the first time by the Act 6 Geo. IV., cap. 91.

The Letters-Patent Act, 4 & 5 Will. IV., cap. 94, repeals the 6 Geo. IV., cap. 91, in fact, but in substance re-enacts its provisions, only substituting letters-patent for a charter. We presume the intention was to save expense, as it has been said that a charter used to cost as much as L.1000. This Act authorizes the formation of companies either with the same liability as they would have had under a charter at common law (*i.e.*, limited), or under similar conditions to those of the previous charter. It is stated in the evidence taken before the Joint Stock Company Committee (1844), that charters with limited liability were granted by the Board of Trade under the powers conferred by this Act to steam-boat companies, and other enterprises connected with the colonies; so that it is plain that the Act was not confined to England. In 1846 and 1847 separate Joint Stock Banking Acts were carried through Parliament (7 & 8 Victoria, cap. 113, secs. 6 and 7; England: 9 & 10 Victoria, cap. 75; Scotland and Ireland). The Scotch Act prohibits the incorporation of banks on any other footing than that of unlimited personal liability; a prohibition which was only removed by the recent Act, 21 & 22 Vict., cap. 91. This Act also, while exhibiting the prevailing feeling in favour of unlimited liability, points to a state of the law when a different rule prevailed. Finally, we know of no authority for holding that the prerogative of the Crown in regard to the creation of bodies politic, is in any degree less extensive or more controlled by law in Scotland than in England.

It may perhaps be admitted that the difference between the phraseology of the English and Scotch Railway Clauses Consolidation Acts is favourable to the opposite view of the question. But we do not think it important. These enactments are not to be read as if they were alterations on the existing law. They are consolidation Acts, or digests of the law as then adjusted and fixed. And therefore, when the Scotch Act says that no shareholder *shall be* liable for calls beyond his share, we don't take that to mean that the shareholder of an incorporated company *was formerly* liable beyond the extent of his share. We would rather read the enactment as

declaratory, or as an extension to companies of the old law in relation to chartered companies.

THE MONTH.

Lord Ivory's Retirement.—The announcement made a few weeks ago, of a vacancy in the First Division of the Court of Session, can scarcely be said to have taken the profession by surprise. The protracted illness that had deprived the public of the services of this learned and much-respected judge, rendered it unlikely that at his advanced age he would be able to return to his public duties with that energy and application which distinguished his judicial career; and Lord Ivory was too conscientious a man to wish to retain a position, to the duties of which he was unable to give his undivided attention. While the profession will greatly regret that his retirement should have been hastened by the pressure of bodily infirmity, it must be a source of satisfaction to the learned judge that he has been enabled for the long period of twenty-two years to assist in the administration of the law, to the study of which he had devoted himself in no common degree; and to bring to the decision of the many important cases that have exercised the acumen of the First Division during the last ten years a weight of experience, such as falls to the lot of few, even of those who are indebted to fortune for early advancement. Lord Ivory, after filling the office of Solicitor-General for a short time, was raised to the bench in 1840, on the recommendation of Lord Rutherford, then Lord Advocate. He was succeeded in the former office by Mr Maitland, afterwards Lord Dundrennan, who, less fortunate than his predecessor, had to wait through many years of opposition before he attained the honours of the bench. Lord Ivory was distinguished, when at the bar, as a sound and erudite lawyer. To the literature of the profession he contributed a useful work on Practice, which the tide of innovation in the forms of judicial procedure has long since left high and dry on the upper shelves of our libraries. But it is as the editor of 'Erskine's Institutes' that his name will continue to hold its place in professional literature. His admirable edition of our great institutionalist, although prepared when the editor was comparatively unknown, is still a standard work of reference; and his notes on moot questions are constantly cited with a confidence in their authority which approaches to that

which is reposed in the works of the institutional writers themselves. Lord Ivory's opinions as a judge were much esteemed, both for their unvarying accuracy in the statement of the law, and for that soundness in the result which can only be attained by a judge who has thoroughly mastered the details as well as the principles of the system of law which it is his privilege to administer. Where he failed to impart with clearness his conceptions on difficult questions of jurisprudence—which sometimes happened—it was, if we may so apply the classic simile, a darkness from excess of light, rather than an obscurity resulting from want of inward illumination. The truth is, that the extent of his knowledge, and the multifariousness of his illustrations, sometimes embarrassed him in the decision of a case, in which a judge of moderate attainments and well-balanced mind would have guessed at the truth, and probably guessed correctly. But this tendency to over-refinement, while it may have occasionally led to delay, or to the expression of doubts which weakened the authority of the decision, was, on the whole, productive of benefit. His careful investigations have cleared up many intricate and debateable boundaries in the unsettled regions of our local law; and to his opinions is due no small share of the high repute which the decisions of the First Division have commanded during the period in which he has been a member of that Court.

At the present juncture, it was perhaps not a matter of great moment who should succeed to the vacant chair in the First Division; for, so long as Lord Colonsay retains the presidency of that Court, he will be what in former years Lord Campbell was in the Queen's Bench, not merely the head of the Court, but its substance. Rarely is the opinion of the sagacious premier of the College of Justice found to be antagonistic to that of a majority of his brother senators; and when it is so, the profession 'knows the reason why.' Since Lord Ivory's retirement the senior member of the Court,—and uniting in his person the three requisites that give dignity and influence to a judge—intellectual supremacy, seniority, and official prestige—the Lord President will, we doubt not, continue to be regarded as the soundest and safest exponent of our national jurisprudence. It is satisfactory, however, to know that the change which takes place in the *personel* of the First Division will in no degree weaken its authority. Lord Ardmillan, who assumes the vacant seat, though not possessed of the critical acumen of Lord Deas, or the elaborate learning of Lord Curriehill, has more originality than either. By taking a bold,

common-sense grasp of a case, he has, as Lord Ordinary, on more than one occasion carried the House of Lords with him, in opposition to the majority in the Inner House; and his quality of mind may be of service in tempering the excessive caution which sometimes characterizes the proceedings of the First Division.

The New Judge.—Until her Majesty's assent has been obtained to the arrangements that are in contemplation, it is of course impossible that any definite announcement can be made regarding the changes which will take place in consequence of Lord Ivory's retirement. It is, however, quite understood by those who are known to be well-informed on such matters, that the Lord Advocate will not accept the vacant seat on the bench, which, according to official etiquette, is placed at his disposal. Some say that his Lordship aspires to a peerage, with possibly the appendage of a new judicial office, as a reward for a long period of faithful service to his party. Others, who cannot see so far through a millstone, are content with observing that the position of Lord Advocate, its important responsibilities, the opportunity it affords for political action and public display, and its agreeable alternations between forensic hard work and London parliamentary life, form a more attractive whole, than the comparatively monotonous occupation of a Lord Ordinary in the Court of Session. Compared, however, with the existence of an advocate in leading practice all the year round, the position of a judge must present the aspect of a haven of repose to one who has for a long lifetime been actively engaged in the contests of the forensic arena; and we are, therefore, disposed to adopt the report which has lately gained credence, that the Solicitor-General is about to accept the office of a Lord of Session. Mr Maitland, although possessing the gift of a ready eloquence, which would well qualify him for a leading position in Parliament, has never manifested any anxiety to enter the House of Commons. His tastes are rather literary than political. No one who is aware of the great legal attainments of Mr Maitland, or his conscientious devotion to his profession, can doubt that his elevation to the bench will be for the public advantage. Yet we can well believe that the comparative leisure which a seat on the Scotch bench affords, may have had weight with one who has always been a hard-working man in inducing him to retire from the bar while still in the zenith of his practice. We do not wish, however, to be understood

as speaking with any greater degree of authority on this subject than as we have already indicated. We believe that matters have not yet been finally fixed; and we are sure that, while the public would gain by the rumoured change, the bar would much regret the loss which it would thus sustain of one of its ablest and most respected members. In the event of a vacancy in the office of Solicitor-General, Mr Young will be appointed to the office, for which his position at the bar so eminently qualifies him.

Obituary—Mr Montgomerie Bell.—It would not be easy to name, within the circle of the legal profession, one whose departure would be more generally lamented than that of the estimable citizen and accomplished lawyer, the late Sheriff of Kincardineshire. The estimation in which Mr Montgomerie Bell was held by his professional brethren, although greatly enhanced by their knowledge of many amiable and excellent qualities which distinguished him in the relations of private life, was a tribute to something more than the possession of the mere ordinary virtues of an undistinguished but respectable gentleman. It was the expression of a conviction that Mr Bell possessed many of the higher attributes which lead to professional eminence, although deficient in the more practical requisites of a successful lawyer.

Mr Bell became a member of the Faculty of Advocates in 1825; and it was remarked by his friends, that from the commencement of his professional career he constantly kept before him a high standard of professional duty, and never lost sight of the responsibilities of the office of an advocate.

'Few men,' says a writer in a local periodical, 'have come to the bar with so high a conception of the duties and public responsibilities which its functions and privileges impose. No one could have a more constant regard to professional ethics, or more habitually remember that our forensic system places the pleader between his client and the public, with a strict obligation of duty to each. With this high sense of the duties of his profession, he was naturally disposed to regard the science of Law in its higher and broader aspects, and to seek for its foundations in the great principles of natural justice and morality. But no one knew better, or more fully acknowledged, that the development of these principles is to be found in the writings of lawyers and the decisions of courts of justice. Another and perhaps still more influential peculiarity of character, was the extent to which public principles and public interests attracted his regards, and affected him as matter of duty; not that he was disposed, like many men actuated by various motives, to interfere much in the details of political life; or, like others, to speculate abstractly upon questions of public policy. His too great disposition to prefer others to himself, as well as the high standard by which he measured his own efforts, led to his seldom speaking in public. Still it was not as matter of speculation, but of duty, that he regarded social and political questions, and the conduct of public men. No one could hold much

intercourse with him without finding that his opinions on these subjects influenced his whole life ; that for them he was prepared to make any sacrifice ; and that, while he was no mere politician, he was in the highest sense a public man, with public aims and purposes of the purest and most disinterested kind.'

Mr Bell's political opinions were those of the Whig party, of which he was a consistent and influential member. Although scarcely to be numbered among the contemporaries of that illustrious band, whose espousal of the creed of political progress seemed likely to prove a barrier to successful exertion within the sphere of their profession, the earlier part of his career belongs to a period when the Liberal party occupied a less influential position than it has since attained. Promotion in those days must have been much slower than in recent times, if we may judge from the fact, that it was only in the twenty-second year of his professional life that Mr Bell succeeded in gaining his first step, when he was appointed Advocate Depute by Lord Rutherford, soon after his accession to office on the retirement of Sir Robert Peel's administration. Prior to that time, Mr Bell had made himself known as a prominent member of the Whig party in Edinburgh. We are unable to concur in the praise accorded to him by a contemporary, as having been in advance of his time on the question of the Repeal of the Corn Laws ; for although, in common with other members of his party now occupying high official positions, he was a member of the Edinburgh Association formed for the promotion of that object, he was, like these gentlemen, a steady supporter of Earl Russell's financial policy, which, it may be necessary to remind the present generation of readers, consisted in the substitution of an eight shilling fixed duty in place of the sliding scale of taxation then in operation. On this question, as on others of a similar nature, Mr Bell was a Whig, and would not have appreciated the compliment of being supposed to be of a more advanced school than his political friends. After the settlement of the great Free Trade controversy, he ceased to take an active interest in public questions, but devoted himself to the duties of his position, first as Advocate Depute, and afterwards as Sheriff of Kincardineshire (to which office he was appointed in 1851), with assiduity and success. He was, however, an occasional contributor to the newspaper press ; as an example of which, we may refer to the series of contributions to the columns of the *Scotsman* in connection with the recent discussions on Parliamentary Reform, bearing the monogram of the respected gentleman whose public

character it is our object to estimate. Of these articles it is sufficient to say, that they expressed pointedly the political predilections and antipathies of the writer, without contributing much to advance the principles upon which the solution of the question of popular representation depends.

As a contributor to professional literature, Mr Bell's reputation rests upon his treatise on Arbitration ; a work which we were glad to introduce to the favourable notice of our readers. Mr Bell's reputation as a scientific lawyer is evidenced by the fact, that the Faculty of Advocates were nearly equally divided in the division between him and Mr Ross on the recent election for the chair of Scots Law in the University of Edinburgh. It will be admitted by all who knew him, that had the choice of the electoral body fallen on Mr Bell, the Senatus would have secured a skilful, accomplished, and zealous coadjutor, while the candidate would have found an occupation congenial to his scholarly tastes and amiable disposition.

Legal Appointments.—Mr Donald Macleod Smith has been Gazetted Sheriff-Substitute of Elgin ; and Mr Alexander Robertson, Sheriff-Substitute of Forfar. These appointments promise to give great satisfaction.

English Cases.

WILL.—(1.) Testator died possessed of shares in a foreign adventure. Subsequently dividends were declared upon profits made previously to his death ; and it was held, they were income, and belonged to the tenants for life of the shares under his will. (2.) Testator was one of a body of shareholders who, on the formation of a company, stipulated for a bonus for their exclusive benefit ; they afterwards, in the lifetime of the testator, relinquished it for a fixed payment per share. It was held, that payments made to the executors in pursuance of the arrangement which was completed after the death of testator, formed a part of the capital of the testator's estate. On the first point, the *M. R.* : The analogy mentioned in *Clive v. Clive*, 23 L. J., Ch. 981, of a specific legacy in bank stock, where the testator died a few days before the time for payment of a dividend, was perfect. The profits were made before, but no part of them was appropriated, or belonged to the testator's estate. The shareholders could bring no action against the company until after the dividend was declared. It was impossible, therefore, to doubt that the dividends were a portion of the income of the legatees for life, and a declaration to that effect must be made.—(*Bates v. Mackinley*, 31 L. J., Ch. 389.)

PATENT.—Plaintiff claimed as an invention the application of double angle iron to the construction of hydraulic joints of telescopic gasholders. Before plaintiff's invention, similar hydraulic joints had been made by means of two

pieces of single angle iron attached to a sheet of iron, so as to form a trough. The jury found, first, that double angle iron had not been applied to the purpose of constructing hydraulic joints to telescopic gasholders before the date of the patent; secondly, that double angle iron was a known article of commerce, of a variety of sizes, and applied to a variety of purposes in the form in which plaintiff claimed to use it; and it was *held*, that this was an application of a known article to purposes analogous to those to which it had been before applied, and therefore not the subject of a patent.—(*Horton v. Mabon*, 31 L. J., C. P. 255.)

PATENT.—Letters patent were granted to W. for an alleged invention of fishes and fish-joints for connecting the ends of rails used on railways. The fishes were made of iron, with a groove on the outer surface, for the purpose of preventing the square heads of the bolts passing through them, and the rail from turning round; and also for the purpose of procuring greater strength, with an equal weight of metal, than could have been obtained from a fish of the same thickness throughout. Before these letters patent had been granted, grooved iron plates, with bolts let into the groove, had been used for the purpose of fastening timbers placed vertically upon one another, or placed horizontally side by side. In one case of a bridge, a channelled plate with bolts had been used for the purpose of fishing a scarf joint where the ends of two timbers met together. *Held*, reversing the judgment below, that the patent was bad. Willes, J.: It appears from the statements of fact in the special case above recited, that the alleged invention claimed by the plaintiff's testator as his, when applied to the pieces of iron used for holding together the ends of rails, to make them for practical purposes a continuous solid body, had previously been known and used as applied to pieces of iron used for holding together the broadsides of pieces of wood placed vertically upon one another, to make them for practical purposes a continuous solid body. In each case, the benefit contemplated and effected, was effected by means of the groove, which gave lightness with strength to the binding iron, and served to hold the heads of the bolts steady whilst the nuts were being screwed on at the other end. This was the one mechanical contrivance used in each case. It was complete in itself when first invented; and though not immediately applied, it was immediately applicable to all forms of pieces of iron used for holding together other materials by the aid of bolts, having a bearing upon the pieces of iron. It required no new invention, but merely an application of the mechanical contrivance already invented, and used to employ it upon several strips of iron instead of one strip of iron, to hold together iron instead of wood, materials placed together horizontally instead of materials placed together vertically, solids, the small ends of which are in contact, instead of solids the broadsides of which are in contact, rails instead of beams. Indeed, it further appears from the facts recited, that the invention in question had been previously applied to pieces of iron used for fishing, in the instance of the Hackney Bridge. Even without reference to the case of the bridge, the use of grooves in pieces of iron for holding materials together by means of bolts and nuts, had been given to the world, together with all its advantages, before the date of the patent in question; and the supposed invention was a mere application of that old contrivance, in an old way, to an analogous subject, without any novelty or invention in the mode of applying that old contrivance to the new purpose.—(*Harwood v. The Great Northern Railway Company*, 31 L. J., Q. B. 198.)

LEGACY, CONDITIONAL.—A legacy was given to trustees upon trust for I. D. for life, in case he should marry the testator's niece E., and, after his decease, in trust for the eldest son of I. D. who should be living at his death and have attained twenty-one. And in case I. D. should not marry E., the bequest was not to take effect, but was to sink into the residue. I. D., with the testator's consent, married another woman, and she and E., who is still unmarried, are both living. Upon a bill by the son of I. D., to secure the legacy, it was *held*, that a marriage with E. was a condition precedent to vesting the legacy, and

that it was not dispensed with by the assent of the testator to a marriage with another woman ; also, that, as the plaintiff's interest was a mere possibility, he could not sustain a bill to secure the legacy. The Master of the Rolls : If the condition be precedent, and the performance of it becomes impossible, the estate or interest never vests, and the devisee or legatee takes nothing ; but if the condition be subsequent, and the performance of it becomes impossible, then the estate does not divest or go over to any other person by reason of the non-performance of that condition. So also, the consent of the person who imposed the condition will remove the consequence of the non-performance of the condition subsequent.—(*Davis v. Angel*, 31 L. J., Ch. 613.)

MARINE INSURANCE.—The owner of a ship caused her to be insured, valued at L.17,000, by the usual form of policy, for a voyage from B. to L. During the voyage, she was compelled by perils of the sea to put into the nearest port, and was found so much damaged, that the captain sent on the cargo by other ships, and afterwards sold the ship, thinking it best for all concerned. The ship cost the plaintiffs L.20,000, and it would cost L.20,000 to build another like her. At the time the policy attached, her value (allowing for wear and tear) was depreciated to L.16,000. The cost of repairing her would have been L.10,500, and her value to sell, when the risk commenced, and at the time her repairs could have been properly executed, would have been only L.7508, she being a ship of an exceptional size and class, for which there was no demand ; but an owner wanting such a ship for the particular purposes of his trade, and having the option to sell her and purchase another, or to repair her, would have repaired her, as he could not have purchased or built another for so small a sum as L.10,500. On a case stated between the assured and the underwriters, in which the question was total or average loss, and in which the Court were to draw inferences of fact, it was *held* it was an average loss only, for that the assured, on whom it lay to make out the loss total, had not done so ; that in order to do so, he must show affirmatively that the cost of repair would have exceeded the value of the ship when repaired ; and the inference from the facts was, that it would not, inasmuch as the price of such a ship in the market was not the test of her real value, which must be gathered from all the circumstances of the case.—(*Grainger v. Martin*., 31 L. J., Q. B. 186.)

VENDOR AND PURCHASER.—In 1837, a solicitor bought lands from his client, who was in embarrassed circumstances. In 1855, the heir-at law of the client filed a bill to have the sale set aside ; and it was set aside accordingly, on the ground of the relative position of the vendor and purchaser, and of gross inadequacy of price. An account was directed to be taken between the parties ; and it appeared on taking the account, that there was no evidence of the payment of the purchase-money beyond the acknowledgment in the deed of conveyance and the receipt indorsed upon it. One of the Vice-Chancellors considered this sufficient ; but, upon appeal, the Lords Justices *held*, that no part of the purchase-money could be allowed in the account, it being the duty of the solicitor to give his client the same protection as if the transaction had been with a stranger, and to preserve independent proof that he (the solicitor) had actually made the payment.—(*Gresley v. Mousley*, 31 L. J., Ch. 537.)

LEGACY.—Testator gave the capital stock or sum of L.800 consols and two leasehold houses to trustees for all his estate and interest therein, upon trust to pay his wife the interest and proceeds for her life ; and, after her decease, upon trust to pay an annuity of L.44 to his daughter for life, with a gift over the L.800 to his grandson and his children. At the death of the testator, the sum of L.800 consols was standing in the names of himself and his wife. It was *held*, upon bill filed by trustees against the wife's executor for a transfer of the fund, that the gift of the L.800 was a general bequest, that the said sum survived to the wife, and that she was not put to her election. Bill dismissed, with costs. Kindersley, V.C. : There does not appear to be any circumstance to prevent the common rule taking effect, that this sum of L.800 survived to the

wife upon the death of the husband. If, however, it was a specific gift, although it would still survive to her, she would, no doubt, be put to her election; but if not, then no question of election would arise. . . . There is no authority to show that this was a specific bequest; there is no reference to any other stock belonging to the testator but this, at the date of his will. He does not actually state that this sum was standing in the joint names of himself and wife. He only says, 'the capital stock or sum of L.800.' Under these circumstances, I think it is a general bequest; and if that particular sum had been sold out during his lifetime, the wife would have been entitled to have it made good out of the general assets of the testator.—(*Poole v. Odling*, 31 L. J., Ch. 439.)

MARKET.—By a local Act, the local board and their lessees were empowered to take from any person occupying any shop, stall, stand, bench, or ground space in any market-place under the management of such board, and used as a general market, such toll as the board might appoint, not exceeding the tolls specified in a schedule to the Act, and that schedule contained a list of tolls to be taken 'from the occupier of every stall raised above the ground,' for the sale of articles, 'according to the size or dimension of such stall, namely, for each lineal foot of frontage thereof,' etc. It was *held*, the Act imposed the toll on the stall or space occupied only, and not on the article sold. *Semble*—that section 13 of the Markets Clauses and Fairs Act, 1847 (10 & 11 Vict., c. 14), which imposes a penalty on selling in any place within the prescribed limits, except in a person's own dwelling-place, articles in respect of which tolls are by the special Act authorized to be taken in the market, means by 'prescribed limits' the boundaries of the borough, and not the limits of the market.—(*Casswell v. Cook*, 31 L. J., M. C. 185.)

WINDING-UP ACTS.—Shareholders in a company, who have either sold or forfeited their shares, may apply for a winding-up order against the company when it has ceased to carry on business and is winding up its affairs privately, if they claim to be contributories, and have been sued and made liable as such. (*In re The Times Fire Assurance Company*, 31 L. J., Ch. 478.)

LANDS CLAUSES CONSOLIDATION ACT.—Plaintiff was the lessee of houses situate on a high road; and defendants, a railway company, being authorized by their Act, made an obstruction and deviation in the road, by which that part of it running by the houses was no longer used as a high road, and the number of persons passing by the houses was greatly diminished, so that the houses were rendered less suitable to be occupied as shops, and their value was greatly diminished; and it was *held*, plaintiff was entitled to compensation under 8 Vict., c. 18, s. 68, and 8 Vict., c. 20, s. 6; inasmuch as the houses were 'injuriously affected:' the test being, whether, on the facts, an action would have lain, at common law, at the suit of plaintiff against defendants, if they had not been authorized by their Act to make the obstruction in the highway.—(*The King v. The London Dock Company* is overruled by *The Queen v. The Eastern Counties Railway Company*; *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 31 L. J., Q. B. 201.)

CONTRACT.—By an agreement in writing defendant agreed to serve plaintiff as his assistant as a surgeon and apothecary for one month, and so on from month to month, until determined by one month's notice, at a certain salary; plaintiff in addition thereto to provide for defendant a dwelling-house at C. to reside in; and in consideration of the premises and of the agreement for hiring, defendant promised and agreed that he should not nor would practise within the distance of five miles from C. without the consent of plaintiff, under the penalty or penal sum of L.100, to be recoverable as liquidated damages, the said sum having been specified by the parties as the amount to be paid and recoverable by plaintiff for the breach or non-observance by defendant of the last-mentioned clause. *Held*, the providing the dwelling-house was not a condition precedent to plaintiff's right to sue for the breach of the agreement not to practise at C., and that such agreement not to practise was not put an end to by a month's notice to deter-

mine the engagement. Also, that the agreement was not void as in restraint of trade, and that the plaintiff was entitled to recover the full sum of L.100 for a breach, but was not also entitled to an injunction to restrain the defendant from practising at C.—(*Carnes v. Nisbet*, 31 L. J., Ex. 273.)

GOODS SOLD AND DELIVERED.—If the maker of a chattel make it with a patent defect so serious as to render it worthless, and the person for whom it is made have an opportunity of inspecting it before it be delivered, the maker is not guilty of a fraud if he do not point out the defect. To an action by the drawers against the acceptor of a bill of exchange, defendant pleaded (*inter alia*) that he had been induced to accept the bill by fraud. In support of this plea, evidence was given and tendered, that the bill was in part payment of a steel gun, which plaintiffs had undertaken to make for defendant, of certain agreed dimensions and quality, but in which there was a defect, such that had defendant known of it, he would have been justified in refusing to accept the gun; that this defect was known to plaintiffs, and had been artificially concealed by the insertion of a plug by plaintiffs' workmen, so as not to be apparent on inspection. It appeared that defendant had had an opportunity of inspecting the gun before delivery, but had not availed himself of it. The gun at first answered the purpose for which the plaintiffs wanted it, but ultimately burst and became worthless, as it was alleged, in consequence of the defect; and it was *held*, that there was no evidence in support of the plea of fraud.—(*Horsfall v. Thomas*, 31 L. J., C. P. 322.)

WILL.—Testatrix, by her will, after giving and bequeathing several legacies, among others some for charitable purposes, proceeded as follows: 'I give, demise, and bequeath to T. M. W. (the defendant) all my real estates, both freehold and copyhold, in,' etc., 'and all the residue of my personal estate and effects,' to hold to him, the said T. M. W., his heirs, executors, administrators, and assigns for ever; upon this express condition, that 'if my personal estate should be insufficient for the purpose, that he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies herein-before bequeathed, and I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid. And I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid legacies and bequests.' It was *held*, these words did not show that testator intended to make a gift of an estate to defendant on a condition, of which the heir might take advantage by way of forfeiture, if defendant failed to perform it by paying the legacies within the twelve months; and that the true construction was, that they created a trust in defendant, the performance of which was cognizable in a court of equity.—(*Wright v. Wilkin*, 31 L. J., Q. B. 196.)

PUBLIC TRUST.—Plaintiff, the surveyor to the trustees of turnpike roads, rendered to the trustees yearly accounts purporting to be the whole amount of the monies expended in the maintenance of the roads, it being his duty to make all contracts and give orders, and pay the sums due in respect thereof, he being permitted to draw cheques on the treasurer to a certain amount, and the balance alleged to be due to him at the end of each year being carried on to the next. From the accounts so rendered, the clerk to the trustees, pursuant to the statute 3 Geo. IV., c. 126, made out and transmitted to the clerk of the peace a statement of the revenue and expenditure of the trust, and these statements were duly published as required by law, and the trustees, with the monies in hand, paid off debts of the trust. Plaintiff subsequently claimed a larger sum as due to him in respect of payments in these years, the whole amount of which ought to have been paid for and brought into the previous accounts, but was knowingly omitted by plaintiff, without any intention on his part to receive more than was due to him. *Held*, that plaintiff was estopped from recovering the excess from the trustees, they having acted upon the faith of the statements in the accounts originally rendered.—(*Cave v. Mills*, 31 L. J., Ex. 265.)

COMMISSIONERS' CLAUSES ACT.—In an action for penalties against a town commissioner, under a local Lighting and Drainage Act, which incorporated the Commissioners' Clauses Act, 1847, 10 & 11 Vict., c. 16, for acting as a commissioner after being disqualified, a bill was produced, made out by defendant, and addressed to the commissioners, for lime purporting to have been supplied at four different times, and receipted by defendant. It was *held* that there was evidence to go to the jury that defendant was 'concerned in a contract,' within 10 & 11 Vict., c. 16, s. 9, which enacts, that any person who at any time after his appointment or election as a commissioner shall be concerned or participate in any manner in any contract under the authority of the special Act, shall thenceforth cease to be a commissioner. Also, that he thereby became 'disqualified,' within section 15 of the same Act, which imposes a penalty on commissioners acting after having become disqualified. The special Act enacted that every person rated to a certain amount within the limits of the Act should be a commissioner; and it was held, that a person so rated and acting as a commissioner was an appointed commissioner, within the meaning of section 9 of the general Act.—(*Nicholson v. Fields*, 31 L. J., Ex. 233.)

LEGACY DUTY.—Testator, a domiciled Englishman, born in England of English parents, was in 1856 appointed, by warrant in the usual form, Chief Justice of the island of Ceylon, to hold and exercise the said office during her Majesty's pleasure, to reside within the said island, and to execute the office in person. Testator, after receiving the appointment, went with his wife and family to Ceylon; and while residing there, and discharging his duties as Chief Justice, duly made his will, and died shortly afterwards on the island, up to the time of his death holding the office and discharging his duties as Chief Justice under the appointment. His widow and executrix obtained probate of his will from the District Court of the said island, and also from the principal registry of the Probate Court in this country, but declined to pay legacy duty on the personal estate of testator, on the ground that he was at the time of his death domiciled in Ceylon and not in England. Testator had left his law books in England, and by his will bequeathed them to relatives in England. He had invested large sums of money on mortgage in Ceylon, which by his will he directed his widow and executrix to collect and invest in English securities. On an information, filed by the Attorney-General on behalf of the Crown, to obtain payment of the legacy duty on the testator's personal estate, it was held, *per Curiam*, that testator, for the purposes of payment of legacy duty, was at the time of his death domiciled in England, and that the duty was therefore payable.—(*The Attorney-General v. Rowe*, 31 L. J., Ex. 314.)

CRUELTY.—A petition by a wife for judicial separation on the ground of cruelty, alleged in the 4th and 6th paragraphs that the respondent on one occasion threw a silver spoon, and on another a walnut, at the petitioner, with great violence, and in the 8th that he was in the habit of using insulting language to the petitioner, and taunting and abusing her in the presence of the governess and servants. The respondent having demurred to these paragraphs, on the ground that none of the matters therein alleged amounted to cruelty, the Court set aside the demurrer as frivolous. The 9th paragraph alleged that the respondent was in the habit of beating and kicking the petitioner, but that she was unable to set forth the particular occasion. To this the respondent demurred, on the ground that he was not bound to answer such vague charges; and the Court set aside the demurrer as frivolous, holding that the generality of the charge was only ground for an application for particulars.—(*Leete v. Leete*, 31 L. J., Pr. & M. 121.)

SHIP AND SHIPPING.—Defendant, a merchant at L., chartered a ship from plaintiffs at a lump sum, and put it up as a general ship. The shippers of goods in the vessel, according to the custom of L., made out and delivered to defendant, for the captain, copies of the respective bills of lading, which were eight in number. It was necessary, as defendant knew, that a document called

a consular manifest should be made at L. before the ship sailed, containing an accurate account of the goods on board the ship, and that for that purpose the person employed to make it out should have all the bills of lading or copies of them before him. On application for the copies by plaintiffs, defendant delivered over only six out of the eight copies as the whole number. An imperfect consular manifest was drawn up from these, and plaintiffs were in consequence subjected to fines and expense at the end of the voyage. *Held* by the Ex. Ch., that in the absence of express contract or mercantile usage, there was no legal duty making it incumbent on defendant to deliver over the copies to plaintiffs, and therefore that no action could be maintained against him by the omission.—(*Dutton v. Powles*, 31 L. J., Q. B. 191.)

DEBTS, PAYMENT OF.—Testatrix devised two farms to trustees, to sell and apply the money for specific purposes. These farms were subject to a mortgage for L.1600. The residue of her real and personal estate she devised to her two sons, and directed that the mortgages, debts, and incumbrances charged thereon should be borne by the premises specifically affected. She then directed that all her debts, funeral and testamentary expenses, should be paid out of her residuary real and personal estate, and she charged the same thereon accordingly. Upon a bill by the parties interested in the purchase-moneys to arise from the two farms, it was *held*, the general direction to pay all debts included mortgage debts, and that the two farms were devised free from the mortgage thereon.—(*Allen v. Allen*, 31 L. J., Ch. 442.)

LEGACY DUTY.—By his will testator bequeathed several annuities to relations in equal degree, and therefore subject to the same rate of legacy duty under the above Act. Testator then gave all his real and personal estate to certain trustees for conversion and investment, and payment of the annuities out of the yearly produce, and for accumulation of the remainder. He directed that upon the death of any of the annuitants the trustees should pay, after making provision for the payment of the remaining annuities, the capital among a class of persons in the same degree of relationship as the annuitants, and therefore subject to the same rate of legacy duty under the above Act. In an administration suit a question arose as to the manner in which the legacy duty was payable. The Master of the Rolls was of opinion that the duty was payable at once upon the whole capital of the fund in respect of all the bequests; but, upon appeal, the Lords Justices, differing from his Honour, *held*, that the duty was payable on the annuities, as annuities, within section 8 of the statute, by four equal payments, of which the first instalment was to be made at the end of the first year of the annuity, and not payable upon the whole capital under section 12.—(*Crow v. Robinson*, 31 L. J., Ch. 516.)

SHIP AND SHIPPING.—The master of a vessel at the Mauritius, in April, entered into a charter-party under seal (therein describing himself as commander and owner) with the Commissariat officer there, for the conveyance of troops to Gravesend, and paid certain monies and incurred liabilities for fitting up the vessel for the purpose. In the following month, he entered into another charter-party, not under seal, at the Cape of Good Hope, for the conveyance of other troops, and thereupon paid further sums and incurred further liabilities to enable him to perform the contract. The owner became bankrupt, having previously mortgaged the vessel. Upon its arrival in the Thames the mortgagees seized it. The master filed a bill against the owner's assignees, praying a declaration that he was entitled to be repaid and indemnified out of the fund due from the Admiralty on account of the freight. The Commissioners of the Admiralty paid the amount into Court. *Held* by the House of Lords, reversing the decision of the Lord Chancellor, and restoring that of Vice-Chancellor Wood, that the master was entitled to be reimbursed out of the fund.—(*Bristow v. Whitmore*, House of Lords, 31 L. J., Ch. 467.)

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NOTES ON THE LAW OF JOINT STOCK COMPANIES.

(SECOND ARTICLE.)

THE object of the Joint Stock Companies Act of the last session (25 & 26 Vict., cap. 89) is to simplify and shorten the statutory code, by which the constitution and administration of joint stock companies is determined. It was not possible, having due regard to the arrangements which had been made upon the faith of previous enactments, to bring within the operation of a uniform system the whole of the various classes of mercantile corporations which had been legalized by the legislation of the last thirty years. Railway companies, deriving their powers in each individual case from a special act of legislative authority—which is not the less special that it includes in each instance the provisions of the general Acts regulating the mode of acquiring land, and the powers of such companies—form a distinct class of mercantile companies, possessing the powers and much of the permanent character belonging to proper corporations. The elaborate provisions of the winding-up branch of the general Joint Stock Companies Acts are obviously inapplicable to this class of companies; and the provisions in regard to registration, which form such a prominent feature in the administrative branch of these enactments, are equally unnecessary in the case of railway companies, the conditions of whose existence, the amount of capital, and their liabilities to the public, are definitely fixed by their Acts of Incorporation. The same observations may be made with respect to joint stock banking companies incorporated by Royal Charter or special Acts of Incorporation. To these classes of companies, accordingly, the provisions of the new Joint Stock Companies Act are not intended to apply. All other descriptions

of joint stock companies are brought within its operation either immediately or prospectively. Now that the separate systems of management for banking, insurance, and trading companies have been superseded by the enactment of a uniform statutory code, we may hope for the development of a comprehensive and intelligible system of joint stock company law, upon the basis of the new statute. What is chiefly to be deprecated is, the continual interference of the Legislature in matters of detail; for, granting even that such changes were always for the better, which is conceding a great deal, the evil of uncertainty, and the expense attending the judicial interpretation of the new provisions, are certain to be much more severely felt by the mercantile community than any slight inconveniences which may arise from imperfection in the statutory machinery of administration.

It would not be possible, within the limits which must be assigned to our exposition, to offer a complete commentary upon the law of joint stock companies as settled by the new Act. This could only be effectually accomplished by presenting a digest of the Act itself, accompanied by parallel citations from the previous statutes, and a comparison of the decisions fixing the interpretation of their provisions with the terms of the corresponding provisions of the new statute. Our object at present is simply to facilitate the study of the new Act by short explanations of the purport of its leading clauses, with references to the clauses which they supersede, and to those cases upon the construction of the prior enactments which have determined questions of principle, or which have a direct bearing upon the new enactments.

In order to determine the extent of the operation of the Act of last session, it will be necessary to point out the limits and extent of the various Acts which it supersedes, and which are referred to in Parts VI., VII., and VIII. (25 & 26 Vict., cap. 89, secs. 175–212), and in the repealing schedule.

The Acts 7 & 8 Vict., cap. 110 and cap. 111, with the relative Amendment Acts of the 10, 11, & 12 Vict., which have hitherto continued to be operative as regards insurance companies, in consequence of the exception of those companies from the Joint Stock Companies Acts of 1856 and 1857, are now repealed; and it has been provided by sec. 209 of the present Act, that every insurance company registered under the 7 & 8 Vict. should, on or before the 2d November 1862, register itself as a company under that Act.

By the same section it has been provided that companies formed in compliance with the provisions of the 7 & 8 Vict., and which had not registered under the late Joint Stock Companies Acts, should be obliged to register under the new Act on or before the same date. Registration under the new Act is, by sec. 210, declared to have the effect of annulling any forfeiture or disability which any of the latter class of companies may have incurred, by reason of their having neglected to register under the Acts of 1856 and 1857.

The Joint Stock Banking Companies Acts of the present reign (7 & 8 Vict., cap. 113, England; and 9 & 10 Vict., cap. 75; Scotland and Ireland), with the Amendment Act (20 & 21 Vict., cap. 49), are also repealed, and provision is made in Part VII. for the registration of banking companies under the new statute. But it does not clearly appear that any penalty or forfeiture is attached to non-compliance with the condition of registration as regards banking companies incorporated by the repealed statutes. Unincorporated banking companies governed by 7 Geo. IV., cap. 46, are not interfered with; nor is any provision made for bringing companies incorporated under the Letters Patent Act, 7 Will. IV., and 1 Vict., cap. 73, under the new code.

Finally, the Joint Stock Companies Act of 1856, as well as the Joint Stock Banking Companies Act, 1857, with the various amendments which have been passed in subsequent years, seven in number, are absolutely repealed; and it will be seen that one main object of the new statute is the consolidation of the provisions of those statutes, and the excision of what was inconsistent or superfluous in their requirements. We shall afterwards have occasion to refer more in detail to the provisions relative to registration. Having indicated thus briefly the classes of mercantile companies to which the statute is applicable, we proceed to notice its leading provisions in their order.

We have already seen that the Act is to apply to all insurance companies; and we note that by sec. 3 it is declared, that any company carrying on the business of insurance in common with any other business, shall be deemed to be an insurance company. By sec. 4, private banking associations consisting of more than ten persons are prohibited; and a similar prohibition is directed against unregistered mercantile companies consisting of more than twenty persons, excepting, of course, companies legalized by special Act of Parliament or by Letters Patent. This clause comes in place of

sec. 4 of the Act of 1856, and sec. 3 of the Act of 1857. The penalties imposed by the clauses referred to in the previous Acts are still in force, the provisions which relate to them having been transferred to Part IX. of the new Act (sec. 210).

Part I. relates to the constitution of joint stock companies under the Act. Sec. 6 of the present Act (sec. 3, Act of 1857) enacts, that seven or more persons associated for any lawful purpose may form themselves into an incorporated company, with or without limited liability, on complying with the statutory requisitions. By secs. 7 and 9, a new description of limited liability is introduced, under the name of liability limited by guarantee. The nature of such liability is indicated by the declaration required to be inserted in the memorandum of association,—viz., that each member undertakes, in the event of the company being wound up during or within a year after the period of his membership, to contribute to the assets of the company, for payment of its debts, liabilities, and expenses, any sum that may be required, not exceeding a specified amount per share. The difference between limitation by guarantee and limitation by shares is, that, in the former case, the creditors of the company receive the benefit of the whole guaranteed fund; while, in the latter, they have only the security of the company's stock at the time of dissolution, including unpaid calls. Examples are given in the second schedule of memoranda and articles of association adapted to the constitution of the three classes of associations—unlimited, limited by shares, and limited by guarantee. The provisions in reference to the adoption of the statutory forms of memoranda and articles of association are contained in secs. 11–16, corresponding to secs. 6–11 of the Act of 1856.

The subscription and registration of a memorandum of association in the form prescribed by the Act, is a legal constitution of the company; and by sec. 18 (sec. 13, Act of 1856) it is declared, that the subscribers of the memorandum of association, together with such other persons as may become shareholders of the company, thereupon become a body corporate by the name contained in the memorandum of association. The certificate of incorporation given by the Registrar is conclusive evidence that all the requisitions of the Act, in respect of registration, had been complied with.

Sec. 20 (sec. 6, Act of 1856) provides for the case of a company having been accidentally registered under the same name as a sub-

sisting company; in which case the Registrar is authorized, at the request of the company, to register the company under a new name. By sec. 21, companies formed for the purpose of promoting any object not involving the acquisition of gain, are prohibited from holding more than two acres of land, unless with the sanction of the Board of Trade.

Part II., including secs. 22-38, regulates the distribution of capital and liability of members; with reference to the ascertainment of which, certain returns are required to be made to the Registrar. By sec. 25, every company under the Act is required to keep a register of members, distinguishing the shares held by each member (see sec. 16, Act of 1856); and also to make out annually, and return to the Registrar, a list of all persons who are members of the company, or who have ceased to be members within the preceding year, together with a summary of the share account (sec. 26 of present Act; see sec. 17, Act of 1856). By secs. 28, 29, and 34, similar provisions are made with respect to companies having capital in the form of stock (see Act of 1857, secs. 5-8). The register may also be inspected, and copies and extracts from it obtained upon certain conditions (sec. 32 of present Act; see sec. 23, Act of 1856); and the register is *prima facie* evidence of any matters directed or authorized to be inserted therein (sec. 37; see sec. 26, Act of 1856). The Court of Session has authority, upon application by summary petition, to rectify the register, and may, in the exercise of this jurisdiction, decide on any question relating to the title of the petitioner to have his name entered in, or omitted from, the register (sec. 35; sec. 9 of Act of 1857). Subject to these provisions, a certificate under the seal of the company is made *prima facie* evidence of the title of any member to the share of stock specified in it (sec. 31; see sec. 21 of Act of 1856).

The liability of members, present and past, is by sec. 38 limited as follows: Past members are exempt from liability from the period of one year after their retirement, and are not liable to contribute in respect of any debt or liability contracted after the period of their retirement; nor are they liable to contribute in any event, if the existing members are able to satisfy the contributions required of them. The liability in the case of limited companies is determined by the form of limitation, and in mutual insurance companies, by the conditions of the contract. Arrears of dividends and profits are not to be regarded as debts of the company in questions

with creditors, but only for the purpose of adjusting the rights of contributories *inter se*. This completes our abstract of the first and second parts of the Act, relating to the constitution of the company, and the effect of registration upon the liability of the members.

The cases that have occurred upon the construction of the corresponding sections of the Joint Stock Companies Acts, 1856–1857, are not numerous. We may notice one upon the construction of the 19th section of the Act of 1856, which has been re-enacted in nearly equivalent terms by sec. 23 of the present Act. The enactment in question is to the effect, that subscription to the memorandum of association makes the subscriber a member or shareholder of the company, and that every other person who has agreed to become a member, and whose name is entered on the register, shall be deemed to be a member of the company. The question which was raised in the case of the *New Brunswick Railway v. Boore* (3 Hurl. and N. 249) was, whether the defendant's subscription of a printed copy of a 'memorandum,' which was not registered until after he had signed the copy, was equivalent to the subscription of the memorandum itself. It was ruled in the affirmative,—Watson, B., observing that the 11th section of the Act of 1856 (sec. 16 of the present Act) did not mean that a memorandum signed by seven persons must be registered before a printed copy was signed, but that a printed copy might be signed either before or after registration. On the opposite construction it would follow, that all the original subscribers must sign the registered memorandum, although the Act only required that it should be signed by seven persons. A party who applies for shares, and agrees to accept, if he afterwards withdraw his offer before an allotment is made, is not liable to be put on the list of contributories. (*Ex parte Graham, etc.*, 30 L. J. Ch. 861; and see as to *locus pœnitentiæ* before completion of a transfer, *New Brunswick Railway Co. v. Muggeridge*, 4 H. and N. 160, 580.)

On the construction of the 13th section of the Act of 1856 (sec. 18 of the present Act), it has been held that the Registrar's certificate, although conclusive, is not the only admissible evidence of the formation of a company, but that certificates of shares sealed with the company's seal are sufficient evidence against the company of its registration and incorporation (*Mastyn v. Calcott Hall Mining Co.*, 1 Fos. and Fin. 334). The sealing of the register of shareholders is not an essential formality; and the omission of this formality does

not hinder the company from holding a subscribing party liable as a shareholder (*Wolverhampton, etc., Co. v. Hawkesford*, 31 L. J. C. P. 184). The Court of Chancery appears to have experienced some difficulty in determining the extent of the powers which are conferred upon it, as well as upon the Court of Session in Scotland, with reference to the correction of the company's register of shareholders (sec. 25, Act of 1856; sec. 35 of present Act). It was observed in the case of the *British Sugar Refining Co.* (3 K. and J. 408), that if there was a serious question as to whether a person ought to be registered or not, the Court would not decide such a question in a summary way. But in *Birch's* case (2 De G. and J. 10) it was laid down, that where the materials for a decision were before the Court, it was bound to avail itself of the statutory power, and to order the register to be rectified, so that the actual state of the register might not obstruct the doing of substantial justice.

In connection with this subject, it will be proper to refer to the cases that have arisen upon the liability of contributories, depending upon the question whether shares have been effectually transferred. By the Act of 1856, sec. 20, transfers of shares were directed to be made in the form specified in the relative schedule, and it was declared that 'the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.' By the present Act it is declared, in general terms, that the share or interest of a member shall be personal estate 'capable of being transferred in manner provided by the regulations of the company.' A form of transfer is given in the schedule of regulations. By sec. 24 it is enacted that 'any transfer of the share or other interest of a deceased member of a company under this Act, made by his personal representative, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the instrument of transfer.'

Under these provisions, the test of liability as a contributory was the completion of a title to the shares or stock by transfer and registration as a shareholder. A party who had rendered himself liable to the public as a reputed partner, or who had merely contracted to purchase shares, but without completing the transaction by transfer, would not have been placed upon the list of contributories. This was the principle of the decisions under the Joint Stock Companies Act, 1848 (*Spence's* case, 17 Beav. 203; *Hall's* case, 1 M.N.

and G. 307; *ex parte* Armstrong, 1 De G. and Sm. 570; *Angas'* case, 1 De G. and Sm. 563); and the principle has been assumed in cases occurring under the Act of 1856. In *Luard's* case, 29 L. J. Ch. 269, 271, it was ruled by the Lords Justices that the placing of a wife's name on the list of contributories in respect of her separate estate, made the husband liable. In the ordinary case of a transfer *inter vivos*, the statute indeed is so clear on the point, that no difficulty has been experienced in determining the question of liability. Serious doubts, however, have been entertained as to the nature of the liability incurred by executors and personal representatives, whether as transferees, or as the parties entitled to take up the succession of a deceased shareholder. The 65th section of the Act of 1856 (sec. 76 of the present Act), which declares that 'the representatives of any deceased contributory shall be liable in a due course of administration to the same extent as such contributory would be liable,' has been supposed to apply to the case of representatives who have not had their title completed by the entry of their names in the register of shareholders; the words, 'liable in a due course of administration,' being equivalent to—liable to the extent of the fund administered. This construction is supported by two recent cases. In *ex parte* Dixon's Exrs. (1 Dr. and Sm. 225), executors who had received dividends, but whose names had not been entered on the list of shareholders, were placed on the list of contributories, but that only *qua* executors, and for the purpose of operating by calls upon the executry estate. In *ex parte* Drummond (2 Giff. 189), administration had been taken out by the son of a testator on the supposition that the succession was intestate; but on its being afterwards discovered that the deceased had left a trust settlement, the Court of Chancery ordered the name of the son to be taken off the list of contributories, and the names of the trustees to be substituted in its place. In this case also there had been no completed transfer, and it does not appear from the report that any attempt had been made to enforce liability against the trustees beyond the amount of the trust estate, though in point of form the trustees were placed on the list of contributories.

On the other hand, it may be inferred from the tenor of the English decisions cited in the preceding paragraph, that executors who have allowed their names to be entered in the register of shareholders with the view of completing a title to the shares or stock, become liable as contributories to the full extent of their means.

These decisions are in conformity with the doctrine of the Law of Partnership, as laid down by Lord Eldon in *ex parte Garland* (10 Ves. 100), according to which, an executor taking up the interest of the deceased in a mercantile business becomes liable to creditors as a partner.

The enforcement of personal liability against executors in such circumstances, has naturally been regarded as a circumstance of hardship,—the more so, because it was thought to be more than doubtful whether an executor could legally transfer shares pertaining to the executry estate, without first having had his name entered on the register; and executors were therefore in a manner obliged to put themselves personally in the position of contributories, in order to the due discharge of their duty of realizing the estate. This difficulty is now obviated by the 24th section (already cited) of the new Act, which enables executors to transfer shares although not themselves members of the company.

It may be superfluous to remind our readers that the question of the liability of trustees and executors as registered shareholders, is at present a pending question in the First Division of the Court of Session, on appeal from Lord Kinloch's judgment in the case of *Buchanan v. the Western Bank*. Our remarks upon this question have been founded mainly upon the Chancery decisions; and we are aware that there are peculiarities attending the registration of trustees as shareholders in Scotch mercantile companies, which have been considered as equivalent to an implied contract on the part of the company to take the trustees bound only in their collective capacity, and as representing the trust estate. Upon this question, accordingly, we do not enter at present. It ought to be mentioned, however, that the new Joint Stock Companies Act does, to a certain extent, recognise the distinction which practice has sanctioned in relation to the registration of trustees as shareholders of Scotch companies. By the Act of 1856 it had been provided, in general terms, that no notice of any trust should be entered in the register, or receivable by the company; but in the new Act (sec. 30) Scotch companies are excepted from this proviso, the enactment being, that 'no notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the Registrar, in the case of companies under this Act, and registered in *England or Ireland*.'

MISS GARRETT AND THE UNIVERSITY OF ST ANDREWS.

A CASE of popular interest, which has recently emerged at the University of St Andrews, wears an aspect not unworthy of being entertained in the columns of a legal journal. The facts of the case, so far as they have been given to the public, are shortly these:—Miss Garrett, a young lady of good fortune and good birth, being desirous to avail herself of the opportunities for medical study which that University afforded, proceeded to St Andrews, and put herself into communication with those from whom she expected sympathy in her views. Before the commencement of the session, she obtained herself matriculated in the usual form with the Secretary of the University; and, on the authority of her matriculation ticket, succeeded in getting herself enrolled in the classes of Chemistry and Anatomy in the United College, where she desired to become a student. Fortified by matriculation and enrolment, Miss Garrett resolved to commence forthwith her attendance at the University. But her thirst for knowledge was destined to be somewhat rudely quenched. The circumstances of the proposed innovation having, in the meantime, come under cognizance of the University authorities, the *Senatus Academicus*, after consideration of the question, finally resolved that it was not expedient, without the co-operation of the other Universities, to lend their sanction to the idea implied in the course of study proposed by Miss Garrett, and laid injunctions on the individual Professors to withhold their permission of attendance until the further orders of the Court. The *Senatus*, at the same time, naturally solicitous about the legal consequences involved in their procedure, authorized steps with the view of obtaining the opinion of counsel on the legality of the proposed exclusion; and that opinion, as our readers are aware, was unfavourable to the claims of Miss Garrett. Miss Garrett, on her part, took the opinion of the Lord Advocate; and finding that it also bore unfavourably on the position which she was desirous to assume, she resolved, as we are informed, to abandon her pretensions. In this state of matters the question now rests. The governing body of the University, acting under the advice of eminent counsel, have decided that they are entitled, if they so will, to exclude females from the privileges of the University. A point of novelty, at least—if not of great practical importance—is thus raised. The same subject has previously, to some extent, been the occasion of University discussion; but we are not aware that the

general question which it involves has ever been so fully or directly raised as in the case before us. So far, indeed, as personal circumstances are concerned, it would be impossible to bring the subject more favourably under the notice of the public. Against Miss Garrett's motives in the course which she is pursuing, we have not heard a whisper of suspicion. On the contrary, it is generally understood that she is inspired by no less worthy an object than the desire to found a college, with the view of securing to women the benefits of professional education. An object so well meriting encouragement, she has, we are happy to know, endeavoured to promote by the utmost decorum and good sense, and justified by the exhibition of rare talent and accomplishments.

The question at once raises the double case of expediency and of law. And even in the columns of a legal journal, no treatment of the subject could be regarded as complete that was made irrespective of the popular view. In one sense, indeed, the popular view is not directly raised by the circumstances of the case at all, because we are here dealing with an isolated, and, in the strictest sense of the word, an exceptional act; and it does not clearly appear that, under any solution, it will ever resolve itself into a general law. We are disposed, indeed, to think that, in this matter, the greatest amount of official recognition would as little affect the practice as the stern discouragement which Miss Garrett has received. The probability of the same course being pursued by others to any considerable extent, depends on no such fortuitous circumstance. If it is a thing in itself right and desirable, and adapted to the present state of society, that men and women should openly consort on the benches of a college class-room, the popular mind will pronounce on the subject, and sooner or later the popular judgment will prevail. But there are some aspects in which an individual case of this kind so directly bears on the consideration of expediency, as to make it desirable to raise the question at once on the assumed foundation of a general rule. Starting, then, with the supposition that the idea suggested by Miss Garrett would, if sanctioned by the University, be followed by a general practice of female academic study, the question is—Would such a general practice be desirable?

To this question we have no hesitation in at once returning a negative answer. And the first reason which we advance for this opinion is one that may not be considered very scientific, but which, we think, is very practical,—namely, that the communion of men

and women, and particularly of young men and young women, is not calculated, on the whole, to further the ends of study. We believe this proposition to be abstractly sound, and to be verified by universal experience. Reciprocally, the element of sex cannot but operate as a disturbing element. In private life, it is quite possible—it is indeed a matter of daily occurrence—that men and women pursue a common course of study with persistent steadiness and regularity. And in the matter of association in a public class-room, we are willing to make all the allowance that is due to the operation of custom in reconciling men and women to habits which, in a different state of society, might be thought inexpedient. But making the largest deductions, we are left with the conclusion too palpable, we think, to admit of any argument, that the prelections of a university cannot be directed with appreciable advantage to men and women at the same time. Will a student apprehend the beauty of the Greek mythology the more readily that the blushes of a living Hebe are constantly flashing on his eye? Will the experimental observation and comparison of female forms fit him to receive in a becoming spirit a disquisition from a classical enthusiast on the girdle of Venus? Is there no danger of too practical a significance being found in the pleasant walks among the groves of Academus?

A graver objection, resting on more serious grounds, is at least conclusive of the case. One of the most marked characteristics of the Universities, both of their constitution and their practice,—a characteristic, indeed, that has, on more than one occasion, justified a great historical boast,—is the perfect freedom of inquiry which they have ever jealously maintained. In the general case, this right has been asserted against restrictive limitations sought to be imposed on the freedom of thought. The conflict waged has been one between the independence of reason and the assumptions of traditional authority. It was never deemed necessary to vindicate so indispensable a condition of intellectual progress as the freedom of speech. But the plea advanced by Miss Garrett obviously imposes this restriction. In many cases, it is true, it could have no appreciable operation. There is no reason, for example, why the prelections of a mathematical, and even for the most part of a classical chair, should not be heard by women as by men. And in one sense, indeed,—and of course we mean the highest sense,—we see no reason why any department of scientific knowledge should be esteemed the property of one sex more than of the other. And primarily,

therefore, we do not so much base our argument against the proposed combination on the ground that there are some branches of university instruction that *ought* not to be propounded in the presence of both sexes. A man, indeed, might complain—and assuming in the meantime that women have the right in question, a woman, *vice versa*, might complain—that the teaching of the University was directed to them in circumstances in which they could not receive it with advantage. But the practical difficulty, we are disposed to think—to a large extent, the feeling of restraint must be reciprocal—would be found to lie, not with the students, but with the Professors. We can conceive no effrontery, and no power of habit, that could induce a man of ordinary—not to say refined and intelligent—feeling, to use the language and practise the demonstrations of a medical class-room without restraint before men and women at the same time. And if all the teaching of the University is not given, the student is entitled to complain, on the mere ground of contract, that the obligations undertaken towards him have not been implemented. The whole question, indeed, resolves itself into a very plain alternative. Either the duties of a college chair can be discharged in such circumstances, or they cannot. In the latter case, we have already considered the result. The possibility of the former implies a laxity of manners that we are not likely to see exhibited in the present day, and involves conditions with which intellectual culture, which is the object to be gained, is not compatible at all.

In the preceding observations, it will be observed, we have not committed ourselves to any disapproval of Miss Garrett's views; and, in truth, we see no reason why they should not be carried into effect, and even through the medium of the University. Private extra-mural teaching is not at present recognised as evidence of medical study. With the facilities afforded by public seminaries, there is no occasion for it. But if this new idea of female education is to receive development, it would be necessary to relax the rule of relying only upon the evidence of the present accredited sources. With the sanction of licensing boards, ladies, like Miss Garrett, might in this way avail themselves of the prelections of Professors outwith the walls of the University. If it be answered that a practical difficulty in the way of this arrangement is the expense which it implies, we have only to say that we are very glad to hear it, and cannot suggest a remedy. If there be anything really sound in the

new faith, a host of followers will speedily remove hardship upon this score. If she is destined to remain in the glory of isolation, we see no alternative for her but to pay for it.

So far the subject is, to our mind, singularly free from doubt. In the idea that women should repair with men to the Universities, we see nothing but inexpediency. But the important question is, Has the University of St Andrews the right to debar Miss Garrett, as it has done, from entrance to the University? We do not, of course, propose to deal with the popular view, that such exclusion is to be regarded as legal, just because it is expedient. Whether, indeed, under a consideration of the character of the Universities, and the sort of outlying independence of the administration of the law which their history has exhibited, this view is not the sound one, is a problem in legal ethics into which we cannot now enter. The opposition between law and expediency, rather than their reconciliation, must be taken as the basis of our present treatment.

Our limits will allow us to do little more than indicate the range of the inquiry. It comprehends, generally, a consideration of the charters of erection and confirmation, of the powers and privileges of the colleges, the statutes and regulations of the University, and the rights at common law which, to a greater or less extent, are shared at once by the governing body, and by the students of the University. The written law will be found at length in an Appendix to a Report of the University Commissioners, presented to Parliament in the year 1837, and is interesting for its quaint and curious lore. Our perusal of it, so far as applicable to the present question, imports that no provision exists, either expressly recognising or expressly excluding women as an integral element in the membership of the University. The most common expression in connection with the objects of the University is the 'education of youth;' and reference is made occasionally to '*viros ingenuos*,' indicating—if any indication indeed were necessary—the gender that was held in contemplation. More dubiously, the students are sometimes described as 'personæ;' and in the original Bull of Foundation, the bequest is said to be for those '*liberalibus cupientes imbui documentis, non solum incolæ civitatis prædictæ, sed etiam circumpositæ regionis*.' Women, indeed, are expressly excluded from the University to the extent that the students are anxiously admonished against concubines, though that continence is rather recommended '*ut decet ecclesiasticos*;' and in a Deed of Ratification by the Parliament of

Scotland in 1579, there is the following clause :—‘ That the wyffis, bairnis, and servandis of the Principallis and vtheris maisteris in the Vniversitie, be put apart in the citie out of the collegis, sua that wemen *to a evil and slanderous example* have not residence amang the young men studentis, nor yet that the same wemen have ony administratioun and handilling of the comon guides of the college, to the greit prejudice thairof and of sic as frelie wuld gif thame selffis to the studies of lettres ;’ but we do not suppose that such circumstances are seriously advanced against the present claim.

The most favourable statement of the written law being, as we have said, that women are not expressly excluded, the first consideration that rises is, How are these charters to be interpreted ? Now, it is a well-known rule of law, that the usage of the time is in such matters the principle of construction. And the usage of the time, certainly, was just what it is at the present moment, that women were not in the habit of resorting as students to the Universities. But in presence of the admission, which it would be unreasonable to withhold, that men, and men only, were in contemplation of the founder, this is a consideration which it is not necessary to press. The question, rather, presents itself in this form : Reading—according to another well-known principle of construction—the intention of the founder by the character of the bequest, is the constitution of the Universities not elastic enough to receive the new element by which it is sought to be impressed ? We are not prepared to answer that question in the negative. What is the bequest ? It is a devise of certain lands and funds with the object of promoting education. All who have that object in view, accordingly, have an interest in that bequest. But in terms of the bequest, the governing body of the University are endowed with administrative powers, to the end of securing that its purposes shall be carried out. How far do these administrative powers reach ? Certainly not to any extent that is inconsistent with the object of the founder. The object of the founder, we have said, in the erection of the University, was *the promotion of education*. It is a settled maxim that trust purposes do not prescribe ; and unless it is disputed, as we can hardly suppose it seriously will be, that women are capable of contributing to this object, it seems to follow that women are beneficiaries under the trust, possessing an interest which they are still entitled to assert.

Looking to the character of the bequest, the usage of the time appears to us to import nothing. It is a bequest for the purpose of

education in all time coming. As such, it must necessarily adapt itself to the varying wants and conditions of society. It has been so interpreted in other matters. Nor, in assuming this position, do we in any way impeach or circumscribe the administrative powers of the Professors. All matters relating to the general working of the University are committed to their jurisdiction. They may regulate the order of the different *curricula*, and they may even impose such conditions as may be deemed expedient to determine admission to the University. They may, for example, say, as in point of fact they do say, that besides a fee to each individual Professor, there shall be a payment to the common fund of the University. But in exercising these powers, it must ever be remembered that they are held in trust for the benefit of the public. Any member of the public is entitled to complain of economic arrangements whereby he is excluded from his interest under the bequest. If the University of St Andrews, for example, were to ordain that the matriculation fee shall be ten guineas, any proposing intrant is entitled to impeach the University in a court of law for malversation of trust. In like manner, the *Senatus Academicus* may ordain that there shall be no attendance without matriculation, and that no women shall be matriculated; but Miss Garrett, as a member of the public, and therefore interested in the bequest, is entitled to call these rules in question.

An argument of some weight, undoubtedly, against this view, lies in the fact that the University is the guardian of its own order and discipline; and it may be urged that the Professors are entitled to declare an arrangement illegal by which they think that these would be subverted. But this obviously would be an enactment by which the interests of one section of the public would be set off against the interests of the other. If the proposed combination is incompatible with the founder's object, the remedy lies with the Legislature, who may interfere to adjust the difficulty if they think the occasion justifies it, not with the University, which strictly possesses only administrative powers.

Our space at present only allows of our touching on the question, and that, too, in very general terms. Considerations of more detail, such as the powers of the University to impose matriculation as a condition of bare attendance, irrespective altogether of general University privileges, and other points of importance, may afterwards engage our attention. We content ourselves at present with this

passing notice of a case which the action of individual enthusiasm, if not its own intrinsic interest, may yet keep before the public.

W. A. B.

New Books.

Studies in Roman Law; with Comparative Views of the Laws of France, England, and Scotland. By LORD MACKENZIE, one of the Judges of the Court of Session in Scotland. Edinburgh: William Blackwood and Sons.

THERE was a time when the study of the Roman law in Scotland formed an important part not only of the education of the rising lawyer, but of his strictly professional or industrial employment. Among the names which have survived among the civilians of what we may designate as the classical period of Scotch jurisprudence, that of Lord Stair is pre-eminent. Certainly no one amongst our native jurists was more deeply imbued with the principles of the Roman law, or more acute in perceiving their relation to the legal system of his own country, than our eldest and greatest institutional writer. In accurate and critical knowledge of the text of the Civil Law, Erskine also will bear comparison with continental jurists of a late date, and of a period more advanced in such learning. But these were not exceptional instances. If the reader will take the trouble to refer to the printed papers in the cases of the last century, which are preserved in the Advocates' Library, or, which will answer the purpose as well, if he will turn over the leaves of a volume of 'Morrison,' he will find, in almost any of the fully reported cases that he may chance to select, abundant evidence of cultivation of the Civil Law by the lawyers of that period.

But this kind of legal argument has long been changed, and necessarily so. From the experience accumulated during the progress of an older civilisation, the great lawyers of the last two centuries had taken and fashioned the instruments for expediting the growing transactions of a people emerging from feudalism. In the subsequent settlement of practical questions, it was natural and inevitable that lawyers should have recourse to the more vulgar, though, for

forensic purposes, more authentic materials, to be found in the reports of decisions, which were themselves perhaps deductions from the Civil Law maxims; until in course of time the original 'workings' have been virtually abandoned. We do not mean, of course, to imply that a man may be a good Scotch lawyer at the present day who is not a civilian; still less that a lawyer can be 'learned,' and yet unacquainted with the principal sources of the legal system which it is his business to interpret. But much of the lawyer's ordinary work may be respectably and creditably performed without such knowledge; and it has followed, though it may be matter for regret, that many of our practical lawyers throw aside the Civil Law with as little compunction as a young subaltern may be supposed to feel when he exchanges the Eton Grammar for the 'Manual and Platoon Exercise.' We must except from the generality of these remarks the author of the work before us, who, having deservedly earned the reputation of a sound practical lawyer, has given evidence of his taste for the study of classical jurisprudence. While we regard the appearance of Lord Mackenzie's treatise as an indication that an intimate acquaintance with the original sources of our legal system still forms a portion of the studies of our best lawyers, we venture to think that it will be found to contribute to classical law literature an instrument, the absence of which has tended very much to impede the progress of such studies in Scotland.

For, great as our debt has been to the Roman law, our literature has hitherto made absolutely no contribution to its modern study, which has lately in other countries been pursued with so much energy and success. France, as the author of the work before us shows, has never been wanting in writers who have been among the foremost in that field of study. The historical reconstruction of the Roman legal system by German writers within the present century, is not the least important work of that labour-loving race of students. Even in England there has long existed a school of writers on the Civil Law, wanting indeed in force and originality, but still of some use in acquainting English students with the results of the investigations of foreign writers. Mr Maine was a teacher of a higher order. Uniting original research and thought with an intimate knowledge of the works of continental writers, he gave the study in England a new impetus, which, we hope, will in due time be felt even in our own country.

In Scotland, however, since the time of Stair and Erskine, there

has been no instance of a writer who has contributed systematically to the advancement of the study of the Roman law; though some of the modern school (among whom the name of Mr Fraser at once suggests itself) have given evidence of a pretty extensive acquaintance with the productions of the continental jurists. The continental treatises we have spoken of, are of course not accessible to every one; and the English compilations from them are wanting in the special interest which will make them read here. Even Mr Maine's writings, proceeding as they do from an English point of view, will scarcely be so much read as their value even to a Scotch lawyer merits.

A treatise on Roman law from the point of view of a learned and successful practical lawyer is a novelty, not only in the legal literature of Scotland, but also in the modern literature of the Civil Law. Though not making any great pretension to originality, there cannot fail to be in such a work points of interest even to the purely historical and antiquarian student of the Roman law; while to the student of Scotch law it opens a field of historical study of the richest interest, though the materials are drawn chiefly from the labours of those little acquainted with the legal system familiar to him.

The scope and general arrangement of the work before us will be best described in the author's own words, which we quote from his preface:—

‘In the present work I have endeavoured to give a concise exposition of the leading doctrines of the Roman law as it existed when it reached its highest development, in the age of Justinian; and great pains have been taken to simplify the subject as much as possible, by a systematic arrangement, by avoiding all abstruse inquiries of an antiquarian character, and by confining myself to such matters as appeared to be useful and instructive.

‘At the outset, I have introduced an historical sketch of the sources of the Roman law, and the political changes in the government, from the foundation of Rome to the accession of Justinian,—of the legislative works of that emperor in the middle of the sixth century, when all the existing laws and imperial constitutions were revised and consolidated,—of the fate of Justinian's legislation in the East and West,—and lastly, of the revival of the study of the Roman law in Europe in the twelfth century, and the progress of this department of knowledge from that epoch down to the present time. Then, after a preliminary chapter devoted to a cursory glance at jurisprudence and the principal divisions of law, I have given a general exposition of the Roman law, divided into six parts, and based principally on Justinian's Institutes, but leaving out some titles which appear to be obsolete or useless, and adding supplementary chapters on various important matters drawn from the Pandects, the Code, and the Novels, as well as from the writings of Gaius, and other sources. These chapters will be found throughout the book, but chiefly under the Fifth and Sixth Parts.

‘To this exposition, which is my chief design, I have added a subordinate one, by drawing some comparisons, more or less important, between the Roman system and the laws of France, England, and Scotland; and although these

illustrations are imperfect, and compressed within narrow limits, it is hoped they will prove more interesting to the general reader than if I had followed the example of many previous writers on Roman law, by entering into minute technical details regarding ancient institutions and usages, which have little or no bearing on modern jurisprudence.'—Pp. vi. vii.

The modest and useful design thus sketched out, has, we think, upon the whole, been executed with neatness and success; and the result is, that there is presented to us, within one moderate-sized and readable volume, a great proportion of the conclusions most interesting to the modern lawyer, that are to be gathered from the labours of recent critics and scholars upon the *corpus juris* and its history. Without aspiring to the higher merit which belongs to a critical treatise or an exposition of the results of original research, Lord Mackenzie has given to the profession a work, original in its scope and execution. Without pretending to novelty, he has brought together a mass of information that will be new to the great majority of his readers, because presented, for the first time, in a popular and attractive form.

After the contents, the author has given us a list of the works consulted or cited in the pages that follow. This, we need hardly say, is an indispensable adjunct to a work of this kind, affording, as it does, the needful direction to works referred to in the notes, besides being useful as a guide for the further prosecuting inquiries on the part of the student who uses the book as an elementary treatise. We observe that, with the exception of Vangerow's 'Lehrbuch der Pandecten,' of which he has not, however, availed himself largely, the author has cited only such German works as have been translated into the French language. The candour implied in this selection, of course, disarms criticism; but we must infer, as indeed is manifest throughout the work, that the author is more familiar with works on the Civil Law in the French than in the German language. As, however, he has been able to avail himself substantially of the works of Savigny, Mackeldey, and Marezoll, besides those of original French writers, the author can have been at no loss for excellent materials in the department of historical criticism; though, perhaps, the institutional part of the book might have been improved, had the author availed himself more largely of German sources, and especially of the 'Institutionen' of Puchta, a work almost as remarkable for the reconstruction of a formal system of Roman law as the works of Savigny are for the construction of an historical system.

The first part of Lord Mackenzie's volume is occupied with an 'Historical Sketch of the Roman Law.' This will be, to the general reader, the most interesting and readable part of the book, as it is, perhaps, on the whole, the best in point of execution, though on some matters, not directly connected with the subject, needlessly provocative of criticism. For example, when Lord Mackenzie, sitting in judgment upon a German scholar called Niebuhr, proceeds summarily to convict him of the offence of constructing 'an entirely new theory of Roman history, which, as Ortolan aptly remarks, has the singular merit of having been wholly unknown to the Romans themselves,' we are more amused at the ingenuity of the *equivoque* than impressed with the profundity of the criticism. To appreciate the exact force of the argument, we have only to represent to ourselves the possibility that some Italian archæologist of a future generation may, by a new induction of facts, under the guidance of sound principles of historical criticism, succeed in throwing fresh light upon the history of the Frankish and Burgundian tribes anterior to the Merovingian dynasty,—a period, the annals of which are at present involved in total eclipse, and where, therefore, in our popular works of history fable is allowed to usurp the place of legitimate criticism. If, of such a contribution to genuine history, it were said that the author had constructed a theory of *French* history which had the merit of being wholly unknown to the *French* themselves,—meaning, in the first instance, the French nation in 'war paint,' and in the second, the French of the Napoleonic *régime*,—we should have then the exact counterpart of Ortolan's famous sarcasm. In one respect only the parallel is incomplete; for it is tolerably certain that the historians of the Roman Empire knew less of the origin of *their* nation, than we know of the history of the barbarous tribes to which the European states trace their descent. Though not, therefore, disposed to concur in the author's method of disposing of a great theory of Roman history, we think at the same time that this part of the work, so far as relating to its proper subject—namely, a sketch of the progress of Roman law—has been well and neatly performed.

The historical portion of Lord Mackenzie's work is followed by a preliminary chapter 'On Jurisprudence and the principal Divisions of Law.' Whatever may be the merits of this chapter as a separate essay, we are inclined to think it, in some points, rather out of harmony with the rest of the work.

In laying down the principal divisions of law, like those of any other science, there always lies a choice between that of adhering in the main to some system of division and arrangement already well known and familiar, and that of adopting the divisions of the subject which appear to the author the most philosophical and exhaustive. Each system has its advantages. Perhaps in no science are the advantages of the familiar, as compared with the philosophical system, greater than in that of law. The familiar happens to be tolerably good; the philosophical, intricate and difficult. What we have called the philosophical system has been attempted by Mr Austin in his Lectures, now in course of publication. The main points of it are followed by our author in the chapter before us. The familiar system is that usually adopted by legal writers, who, with more or less variation, adopt in the main a system of divisions and arrangement based on the Institutes of Justinian. This is the course taken in the succeeding portion of Lord Mackenzie's book.

When an author proposes a new system of division of his subject, we suspend our judgment upon its merits till we see how it is worked out. We are waiting for the promised volumes of Mr Austin's Lectures to be able to form a judgment of *his* method. As Lord Mackenzie has not provided us with the requisite data, we must also suspend our judgment upon his, and we may take them to avizandum together.

There are, however, good points in this introductory chapter. In reading a book like Mr Austin's Lectures, while we feel that the writer is deeply imbued with the desire to see realized the assimilation between positive law and the requirements of justice as founded on reason and expediency, we feel at the same time that the writer scarcely appreciates either the difficulties to be overcome, or the independent value of law apart from justice. It is refreshing to find in a preliminary chapter, on the General Principles of Law, the following sentences of an experienced lawyer :—

‘The best contrived laws being intended for general use, it is impossible to shape them so correctly as to suit all the variety of cases that may happen, and there are many ways in which men may injure one another without the civil law affording any means of redress. So imperfect, indeed, is the civil law, that in attempting to do justice, it sometimes puts it in the power of a man to take exorbitant advantages contrary to conscience.

‘Against these imperfections there is no appeal, except to the conscience. And here we are reminded of the three general precepts mentioned by Justinian—to live uprightly, to hurt nobody, and to render every one his due. These maxims breathe a fine spirit of morality, and are evidently for the common advantage of men in their social relations; yet, with all their excellence, they fall

greatly short of the golden rule of the Gospel—"All things whatsoever ye would that men should do to you, do ye even so to them." Matt. vii. 12.

'The general security of private rights and of civil life requires adherence to fixed rules and prior decisions by courts of law, and this occasionally leads to hardship in particular cases; but this particular hardship, after all, is a lesser evil than the general uncertainty and confusion that would spring up everywhere, were the discretion of judges left entirely unfettered by positive rules.'—P. 47.

There is in the same chapter a short and concise statement of some points of international maritime law, so interesting at the present time that we are induced to quote the passage entire:—

'In a report made to George II. in 1753 by Sir George Lee, Dr Paul, Sir Dudley Ryder, and Mr Murray (afterwards Lord Mansfield), we find the following statement as to the rights of belligerents:—

"When two nations are at war, they have a right to make prizes of the ships, goods, and effects of each other on the high seas. Whatever is property of the enemy may be acquired by a captain at sea; but the property of a friend cannot be taken, provided he observes neutrality. Hence the law of nations has established—

"1. That the goods of an enemy on board the ship of a friend may be taken.

"2. That the lawful goods of a friend on board the ship of an enemy ought to be restored.

"3. That contraband goods going to the enemy, though the property of a friend, may be taken as prize; because supplying the enemy with what enables him better to carry on the war is a departure from neutrality.—*Collectanea Juridica*, vol. i., p. 129–66.

"In the case of ships and goods taken at sea, the title does not pass until the validity of the capture has been declared by a Prize Court of the state to which the captor belongs."

'That a belligerent is entitled to seize an enemy's goods on board a neutral vessel, was long an established principle of the law of nations, and is said to go back as far as the Middle Ages, though it has repeatedly been called in question in more recent times.—(Grotius, lib. iii. c. vi. sec. 26; Hautefeuille, t. iii. p. 223; Martens, Précis, t. ii. p. 319.) On this subject a dispute arose between Great Britain and Prussia in 1752, when a memorial from the Prussian minister elicited the celebrated report of the English jurist already noticed. During the war which followed the French Revolution the controversy was revived, and the Northern Powers of Europe and the United States joined France in maintaining that free ships make free goods excepting contraband, that nothing is contraband but arms and military stores, and that a convoy precluded neutral ships from being searched.—(Thiers, Hist. du Consulat. et de l'Empire, t. ii. p. 102; North American Review, vol. xxvi. p. 211.) But Britain uniformly resisted these pretensions, as contrary to the law of nations.

'By the declaration of 16th April 1856, the Congress of Paris, held after the Crimean war, adopted four principles of international law. 1. Privateering is and remains abolished. 2. The neutral flag covers the enemy's merchandise, with the exception of contraband of war. 3. Neutral merchandise, with the exception of contraband of war, is not liable to seizure under an enemy's flag. 4. Blockades, in order to be binding, must be effective,—that is to say, must be maintained by a force really sufficient to prevent approach to an enemy's coast. (Martens, Précis, 1858, t. ii. p. 269.) This declaration was signed by the plenipotentiaries of the seven Powers who attended the Congress, and it was accepted by nearly all the states of the world. But the United States of America, Spain, and Mexico refused their assent, because they objected to the abolition of privateering (Official Report to the French Emperor, in *Moniteur*, July 1858).—Pp. 56–58.

We have left little space for a detailed criticism of the main part of Lord Mackenzie's work, namely, his Exposition of the Roman Law. In this part, the author follows, as a general rule, the order of the Institutes of Justinian, though with slight departures, suggested by the object of presenting that law as a practical system, illustrated by comparisons, introduced into each chapter, with the laws of France, England, and Scotland. This comparison of the various systems of law in their leading features, though stated in the preface to be only a secondary object of the work, is by no means its least interesting, and is certainly one of its most novel features. The exposition of the Roman law itself is well compiled and clearly written, and will generally be found to contain the views of some of the best modern writers upon most points applicable to existing practice. Perhaps the happiest efforts of the author have been expended on the 5th Part, which treats of Roman actions and procedure; in expounding which, an intimate acquaintance with the exigencies of one system of procedure has no doubt enabled him to realize the exact bearing of the several steps, and to express himself with a clearness and precision which is not in the power of writers less familiar with actual forms of process in daily use. Altogether, we anticipate that the book will be found one of great usefulness. As an introduction to the study of Roman law, it will be an excellent handbook for the student; while there are few lawyers who may not have occasion to resort to it to refresh the memory, or to recal the clue to some train of authorities. Such a work, though but the fruit of the *horæ subsecivæ* of more arduous occupation, is as creditable to the literary taste and culture of the author, as we feel assured it will be serviceable to the profession for whose use it was designed.

Law of Highways in Scotland; with Statutes, and Digest of Decided Cases in England and Scotland. By HUGH BARCLAY, LL.D., Sheriff-substitute of Perthshire. Fourth Edition. Edinburgh: T. and T. Clark.

DR BARCLAY'S reputation as an accurate and sound expositor of practical law is so well established, that a new edition of any of his numerous contributions to legal literature is certain to be well received and extensively used. The present work belongs to a department of legal research which has been more extensively and

successfully worked by the English lawyers than amongst ourselves ; we mean the exposition of statutory law. Every year adds to the number of practical statutes, which may be considered as addressed more especially to that class of her Majesty's subjects who are entrusted with their administration, and with which the general practitioner has not always the opportunity of becoming experimentally acquainted. He may combine the learning of a professor with the sagacity of an experienced adviser, and yet be as completely at sea in the construction of some statutory enactment of familiar application, as the youngest apprentice in his office. Moreover, the reports of the decisions of our Supreme Courts will seldom be found to afford that assistance for which in other branches of law they are naturally consulted. Cases on the construction of practical statutes are indeed of frequent occurrence in the Sheriff Courts ; but the questions raised are rarely of sufficient interest or importance to justify the expense of an advocacy, and the case law therefore remains unpublished until it is collected and digested by a commentator.

But for the publication of Dr Barclay's manual, the Law of Highways must have remained in the abnormal position which we have described. Of great importance to those concerned in its administration, on account of the large amount of capital embarked in the construction of roads and bridges, it is scarcely less important to members of the public, whose safety and daily convenience give them a direct interest in the proper management of the ordinary means of transit. We can therefore well believe that, to the general practitioner, a work which exhibits clearly and succinctly the whole of the statutory and case law, both in relation to the duties of road trustees and the rights of the public, will be found very useful.

Dr Barclay puts the statutory law, arranged in chronological order, in the foreground of his design. The notes to this part of the work consist merely of cross-references and explanatory remarks on parallel sections in the English statutes ; the case law being made the subject of separate exposition, so as not to interrupt the continuity of the text of the statutes.

In the arrangement of the decisions, the author has adhered to the original plan of the work, viz., that of a digest of cases arranged under a few leading and appropriate headings. The mass of material which he has accumulated might have justified a reduction

into the narrative form ; yet, considering that a considerable proportion of the cases cited are Sheriff Court decisions, which are not accessible to the public in other publications, we do not regret that Dr Barclay has thrown this portion of his treatise into a form which admits of greater fulness and circumstantiality of detail than would be possible in a continuous exposition. Where the subject is not too large to be disposed of in that way, a well-arranged digest of cases, with suitable extracts from the opinions of the judges, is perhaps the most useful mode of exhibiting positive law. Where the problems to be discussed are such as receive their solution from considerations of principle and not from enactment, the method in question is neither adequate nor appropriate ; but in relation to such a subject as the Law of Roads, it answers the practical requirements which the author has in view. We are glad to find that Dr Barclay has been able to illustrate his subject by a large number of decisions of the Sheriff Courts, among which those of the learned author himself are not the least instructive and interesting. We feel assured that the confidence which is generally reposed in the administration of the common law by our local judges will be extended to their decisions on a class of questions which lies peculiarly within the province of the Sheriff Courts.

The concluding part of the work consists of a brief digest of the more important English decisions upon questions of Road Law, including excerpts from the statutes giving rise to those questions. Upon this part of the work we should not feel qualified to pronounce an opinion, without making a more careful examination of the decisions than we are able at present to undertake. But from our knowledge of the author's acquirements and habits of accurate investigation, we feel assured that in this, as well as in other parts of the volume, the reader will have no reason to be disappointed with the execution of his design.

THE MONTH.

A NEW legal year has been commenced, dating from the period to which legal events are most usually referred—namely, either from Martinmas term, or from the commencement of the Winter Session of the Court of Session. If we except the recent changes in the

higher walks of the profession, it cannot be said that the events of the last month present any features of sufficient interest to call for more than a passing notice. The momentary interest attaching to those changes is already past; while their operation has extended over so small an interval of time, that little can be affirmed, or even predicated, as to their results. Lord Barcaple, formerly Solicitor-General Maitland, will, we doubt not, justify, by the result of his judicial determinations, the confidence that was reposed in his opinions as a consulting advocate; but his Lordship has, at the time we write, been seated on the Outer House Bench just two weeks; and, with the exception of a case involving the question of the retrospective operation of the Trustee Act, which he has reported to the First Division, has not yet had the opportunity of issuing any deliverance likely to attract the notice of the profession, or to exhibit to advantage those judicial qualities, and that extensive and accurate knowledge of our municipal law, which he is known to possess in an eminent degree. The appointment of Mr Young to the office of Solicitor-General does not involve any change in the forensic arrangements of the Court, except in so far as it enables that gentleman to lead one or two practising members of the Bar who happen to be his seniors in point of professional standing. The elevation of Mr Maitland, however, must of course have the effect of dispersing a large and lucrative practice among other gentlemen aspiring to the position of seniors; for, in the meantime, it would rather seem as if there were no 'coming man' ready to slip into the position vacated by the late Solicitor. During the parliamentary recess, the Lord Advocate will doubtless continue to occupy a leading position as senior in Inner House cases; but past experience has shown that attention to parliamentary duties necessarily interferes to a large extent with Court of Session practice; and it may be expected, in the natural course of things, that the gentlemen whose names have hitherto appeared most frequently in the Reports in the capacity of juniors, will divide amongst them a considerable portion of the practice which formerly belonged to the late Solicitor-General as a leading counsel. It would be premature to speculate upon the results of such a change as regards the interests of clients. Experience alone can show whether the rising members of the Bar will be able to maintain the high reputation which the profession, in its senior branch, has hitherto enjoyed. But we are only giving expression to the general sentiment of the Parliament House, when

we say that for some time past the senior ranks of practice have been unduly narrowed. The middle ranks of the Bar comprise a considerable number of pleaders nearly equal in point of ability, attainments, and professional standing; and without pretending to any gift of divination, we may hazard the prediction that senior practice will, for a considerable time to come, be divided amongst a much larger number of well-qualified aspirants than heretofore. While adverting to the changes, present and prospective, in the higher walks of the profession, we must not forget to chronicle certain minor appointments, less important to the public interests, though extremely fortunate for the gentlemen whose advancement has been hastened by the recent vacancies. Mr William Ivory, who received his first appointment under the Crown just before the retirement of his party from office in the winter of 1857-8, became senior Advocate-Depute last spring, and has now been appointed Sheriff of Inverness-shire, Mr Clark having succeeded Mr Young as Sheriff of Haddington and Berwick. Mr Shand, who was appointed Advocate-Depute in the Sheriff Court in 1859, succeeds the late Mr Montgomerie Bell as Sheriff of Kincardineshire. The new Advocates-Depute are Mr G. H. Thoms and Mr J. A. Crichton. Mr Burn Murdoch succeeds Mr Thoms as Advocate-Depute in the Sheriff Court. It would be mere affectation to ignore the fact that the administration of legal patronage in Scotland under the present Government has given rise to great dissatisfaction, which has already extended beyond the sphere of the Parliament House. Not wishing that our remarks should bear a too personal application, we refrain from further comment at present; but will take an early opportunity of drawing the attention of our readers to the subject.

We purpose in our next number again to direct the attention of our readers to the defects in the present system of procedure in the Court of Session, and to point out the particular changes which, as we venture to think, experience has shown to be requisite. We had intended in our present impression to have introduced the subject, by exhibiting somewhat in detail the growing decrease in the business of the Court of Session as compared with that of the Sheriff Courts; and with that view, had prepared the annexed abstract of a return obtained by Mr Caird, M.P., in the last session of Parliament, by which the decrease in the practice of our superior courts is rendered very apparent. Unfortunately, the demands upon our

space, in the shape of arrears of Acts of Parliament, and the necessary indices of the volume which this number completes, preclude the possibility of entering upon this important subject with that fulness which its important bearings demand. The table, however, speaks for itself; and if the cogent rhetoric of authentic statistics fails to convince our readers of the necessity of some material modification in our procedure, adapted to meet the demand for speedy justice which has been already too long neglected, we shall despair of producing the desired impression by any argument or illustration at our command.

SUMMARY of 'Return of Litigated Cases finally decided during the year 1860 in the Court of Session; the time during which each cause has been in dependence, and the expenses awarded in each against the losing party; and where the conclusions were pecuniary, the amount of the principal sums decerned for.'

'Like Return for the Sheriff Courts at Glasgow, Perth, Ayr, and Aberdeen, including Small Debt Causes.'

'Return of the total number of Small Debt Causes (*not being decrees in absence*) decided in each Sheriff Court in Scotland during the same period, showing the number thereof decided at the first sitting, the total amount of expenses awarded against the losing parties, and also the average amount per case of such expenses.'

The order on Address of House of Commons moved by Mr Caird, 29th April 1861.

Return ordered to be printed 7th February 1862.

First, Summary of Court of Session Return.

Number of cases finally decided within the year 1860 (the names are given), 583.

Length of defence above 10 years, 18.—One case, 31 years. One do. 28 do. One do. 24 do. One do. 20 do. One do. 19 do. Five do. 17 do. One do. 16 do. Three do. 13 do. One do. 12 do. Two do. 11 do.

Brought and decided within the year, 261. The shortest period, seven days.

In the 583 cases there was decreed sums above L.1000 in 57 cases. The highest sum of principal decerned for was L.25,000.

In the 583 cases there was decreed sums at and below L.25 in 22 cases. The lowest sum decerned for was 1s.; the next higher, 5s.; and two of 9s. each.

In the 583 cases expenses were decerned for at and above L.100 in 286 cases. The highest amount was L.1012; the lowest, L.2, 2s.

In 50 cases the expenses awarded were at and under L.25.

Second, Summary of the Sheriff Court Returns of the Four Courts.

(Why was Edinburgh, with Three Substitutes, excluded?)

1. *Sheriff Court, Glasgow. (Four Sheriff-Substitutes.)*

Litigated cases finally decided within the year 1860, giving the names, 390.—In dependence upwards of one year, 28; one, five years and upwards; one, four years; one, three years; seven, two years; eighteen, upwards of one year.

Decided within one month, 24. The shortest, eight days. The highest sum of principal decerned for, L.568.

Decrees for principal sums above L.25 were given in 80 cases. The lowest principal sum decerned for was 30s.

Decrees for expenses were given for sums above L.10 in 78 cases. The highest award of costs was L.52. (The case was in dependence two years and fifty-four days.) The lowest award of costs was 6s. 1d. (The case had been in dependence two years, and the defender was ultimately assoilzied.)

2. *Sheriff Court, Perth. (One Sheriff-Substitute.)*

Litigated cases finally decided within the year 1860, 100.—In dependence upwards of one year, 34; two, for four years; two, for three years; nine, for two years; twenty-one, for upwards of one year.

Decided within one month, seven. The shortest, seven days. The highest sum of principal decerned for, L.442.

Decrees for principal sums above L.25 were given in eleven cases.

Decrees for expenses were given for sums above L.10 in 38 cases. The highest award of costs was L.55. (The case had been in dependence for 3 years 104 days.) The lowest award of costs was 25s.

3. *Sheriff Court, Ayr. (One Sheriff-Substitute.)*

Litigated cases finally decided within the year 1860, 67.—In dependence upwards of one year, 30; one for three years; ten for two years; nineteen for upwards of one year. Decided within one month, 10. The highest sum of principal decerned for was L.500. Decrees for principal sums above L.25 were given in fifteen cases. Decrees for expenses above L.10 were given in nineteen cases. The highest award of costs was L.39; the lowest award, 30s.

4. Sheriff Court, Aberdeen. (One Sheriff-Substitute.)

Litigated cases finally decided within the year 1860, 128.—In dependence upwards of one year, 47; one for three years; one for six years; six for two years; 39 for upwards of one year. Decided within one month, 12.

The highest sum of principal decerned for was L.550. Decrees for principal sums above L.25 were given in 39 cases. Decrees for expenses above L.10 were given in 35 cases. The highest award of costs was L.52. (The case had been in dependence for two years and 180 days.)

SMALL DEBT COURTS.

| COUNTY. | Decrees not in absence. | Decided at First Sitting. | Total Amount of Expenses awarded. | Average Amount of Expenses per Case. |
|--------------------|-------------------------------|---------------------------------|---|--|
| 1. Lanarkshire, . | 8367 | 6034 | Not stated. | L.0 4 7 |
| 2. Edinburgh, . | 1003 | 687 | L.235 19 1 | 0 6 2 |
| 3. Renfrew, . . | 676 | 508 | 84 12 1 | 0 5 10 |
| 4. Forfar, . . . | 655 | 432 | 112 10 0 | 0 3 6 |
| 5. Aberdeen, . . | 650 | 458 | Not stated. | 0 5 3 |
| 6. Ayr, | 618 | 467 | 137 2 5 | 0 4 5 |
| 7. Perth, . . . | 588 | 345 | 122 7 6 | 0 4 7 |
| 8. Dumbarton, . | 447 | 357 | 136 12 4 | 0 6 1 |
| 9. Fife, | 427 | 348 | 93 13 11 | 0 4 7 |
| 10. Stirling, . . | 439 | 322 | 107 9 0 | 0 4 11 |
| 11. Inverness, . | 339 | 230 | 135 19 6 | 0 8 4 |
| 12. Banff, . . . | 344 | 194 | 76 1 0 | 0 4 5 |
| 13. Elgin, . . . | 307 | 241 | 67 11 0 | 0 4 5 |
| 14. Argyle, . . . | 316 | 259 | 66 8 8 | 0 4 2 |
| 15. Dumfries, . . | 247 | 209 | 68 17 8 | 0 7 11 |
| 16. Caithness, . | 242 | 181 | 65 6 6 | 0 5 4 |
| 17. Ross, | 251 | 196 | 79 19 11 | 0 5 3 |
| 18. Wigtown, . . | 148 | 135 | 49 16 0 | 0 6 8 |
| 19. Linlithgow, . | 143 | 83 | 16 15 11 | 0 2 6 |
| 20. Peterhead, . | 139 | 70 | Not stated. | 0 5 3 |
| 21. Kirkcudbright, | 134 | 77 | 20 0 8 | 0 2 11 |
| 22. Orkney, . . . | 99 | 89 | 20 6 7 | 0 4 1 |
| 23. Kincardine, . | 96 | 64 | 48 18 4 | 0 10 4 |
| 24. Haddington, . | 92 | 84 | 8 3 6 | 0 5 1 |
| 25. Roxburgh, . . | 82 | 24 | 19 13 11 | 0 3 8 |
| 26. Bute, | 68 | 46 | 16 15 7 | 0 4 11 |
| 27. Sutherland, . | 58 | 50 | 15 12 2 | 0 5 4 |
| 28. Nairn, | 50 | 40 | 10 8 8 | 0 4 2 |
| 29. Berwick, . . . | 40 | 26 | 12 18 9 | 0 6 8 |
| 30. Cromarty, . . | 37 | 29 | 7 5 0 | 0 4 0 |
| 31. Peebles, . . . | 29 | 23 | 9 11 6 | 0 6 7 |
| 32. Shetland, . . | 27 | 20 | 7 2 7 | 0 5 3 |
| 33. Kinross, . . . | 26 | 20 | 3 2 7 | 0 4 5 |
| 34. Selkirk, . . . | 15 | 15 | 3 9 4 | 0 4 7 |

The following gentlemen were, on the 13th November 1862, admitted members of the Society of Writers to the Signet, viz.:—Mr John Hendry, Mr John Forman, and Mr C. Y. B. Bell.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

POWELL AND CO. AND MANDATORY v. GALLACHER.—Nov. 13.

Reduction—Title to Exclude.

Powell and Co., corn merchants, Liverpool, the pursuers in this action, averred that in February 1862 they had made advances to the defender Crean, on the faith of certain shipments of oats, but that, instead of being delivered to them, the oats had been sent to certain merchants in Glasgow. The pursuers applied to the Sheriff of Lanarkshire for an interdict against these merchants delivering said oats to any one except the petitioners, and from making advances to the defenders in respect thereof. The defender Gallacher, a pawnbroker in Ireland, appeared and opposed the interdict, on the ground that the oats belonged to him, and not to Crean; and produced a letter bearing to be from Crean, of date 24th February 1862, offering the oats for sale, and a bill bearing to have been granted by Gallacher to Crean for L.1000, in proof of the sale. The present action was raised for reduction of these two documents, and for payment of L.907, as the balance of the account due by Crean, the pursuers alleging that the sale from Crean to Gallacher was simulate and fraudulent. Gallacher stated a preliminary plea in defence, that he should not be required to satisfy production, on the ground that the pursuers had no title or interest to pursue the reduction. In the process of interdict which was brought up by advocacy *ob contingentiam*, Gallacher pleaded that he was not subject to the jurisdiction of the Scotch Courts. The Lord Ordinary (Ardmillan) held, that as Gallacher had founded on the documents and the alleged sale in the Sheriff Court process, he could not prevent the party against whom they were pleading from having them looked into in a reduction; and that Gallacher having appeared and pleaded in the Sheriff Court, he could not now plead want of jurisdiction. After the Lord Probationer had expressed his opinion on the case, the Court adhered.

LINDSAY (TRUSTEE FOR THE EARL OF STRATHMORE AND KINGHORN) v. BELL.—Nov. 15.

Submission—Landlord and Tenant.

This was an application by Lindsay for interdict against a waygoing tenant, to prevent him selling corn, fodder, etc., of the last year's crop. The tenant expressed his willingness to make over the same at a value to

be ascertained by arbiters, to be mutually chosen, in terms of the lease. The complainer insisted that he was not bound to enter into the submission, unless a clause was inserted to the effect that the subjects were to be valued at their value for consumption on the farm. The tenant maintained that the market price was the proper value, and that he was not bound to agree to any such stipulation in the submission, on the ground that the lease contained no such condition. The Lord Ordinary (MacKenzie) held that the submission should be framed in conformity with the terms of the lease, as proposed by the respondent; and that to insert the stipulation for which the complainer insisted, would be making a contract for the parties which they had not made for themselves in the lease; and refused the interdict. The complainer reclaimed. The Court unanimously adhered, holding that the Court could not fix beforehand the principle of valuation, and that this was a matter for the discretion of the arbiters. The interdict was accordingly refused.

ANDERSON v. DRYSDALE AND OTHERS.—Nov. 22.

Process—Interdict—Intimation.

This is a note of suspension and interdict at the instance of John Anderson, fishmonger, Edinburgh, against James Drysdale, auctioneer, Stirling, and others. The complainer prays for interdict against the respondents from fishing for salmon *ex adverso* of certain lands on the western bank of the river Forth, in the county of Clackmannan—of the fishings of which lands the complainer is tenant. On the 17th July last, the Lord Ordinary on the Bills pronounced the following interlocutor:—‘To see and answer within six days after intimation; reserving as to caution, and also reserving consideration of the question of the interdict till the case comes to be advised, with or without answers.’ On the 18th July, a copy of the note of suspension and interdict, but not of the foregoing interlocutor, was served by a messenger-at-arms upon the respondents. The execution of service, *inter alia*, bore—‘In her Majesty’s name, and in name and authority of the said Lord Ordinary, lawfully intimate the said note of suspension and interdict to you the said James Drysdale, respondent, by serving you with the foresaid copy, that you may not pretend ignorance of the premises, and cite you to lodge answers thereto, if so advised, within six days next after the date of this my intimation given you, with certification as effairs.’ Copies in similar terms were served on the other respondents. Answers were lodged, in which the respondents pleaded that, there having been no competent service upon them, in respect no copy of the interlocutor ordering service and answers was served, the note should be refused. Thereafter, on 25th July, a copy of the note was served anew on the respondents, along with a copy of the interlocutor ordering service and answers, and the previous service of the note was withdrawn. But on the day preceding, viz., the 24th July, the Lord Ordinary on the Bills pronounced an interlocutor passing the note on caution, and granting interdict as craved. It was contended for the reclaimers, that under the statute of 1 & 2 Vict., cap. 86, service in common form, both of the note of suspension and of the interlocutor ordering service and answers, is required, and that the common form of service is by a copy of the writ served. The complainer

contended that the requirement of the statute was sufficiently complied with by the reference in the messenger's execution to the terms of the interlocutor.

The Court held that the direction in the statute had not been complied with, and therefore recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary on the Bills to advise the case with the answers given in.

SECOND DIVISION.

Susp., CAMPBELL v. BLACKWOOD.—Nov. 7.

Process—Sheriff Court.

Campbell, the suspender, some time ago raised an action in the Sheriff Court of Peebles, against a person of the name of Lindsay, in which he was unsuccessful; and the Sheriff, adhering to the interlocutor of the Sheriff-substitute, assolzied Lindsay, dismissed the action, and found the defender entitled to expenses. This judgment, dated 5th July 1859, disposed of the merits of the cause. The decree was not extracted; but no advocacy was presented. After the judgment was pronounced, the suspender (who was the unsuccessful pursuer of the action) borrowed the process, and, though repeatedly applied to, he failed to return it till November 1859, being more than three months from the date of the judgment. By the Sheriff Court Act, 16 & 17 Vict., c. 80, sec. 15, it is provided that any action in which neither party moves for three months shall *eo ipso* stand dismissed, but with power to the Sheriff to revive it within the next three months, on a motion made to that effect. In the present case no steps were taken to revive the action within the statutory period; but the defender's account of expenses was given in, and taxed in presence of both agents. The Sheriff-substitute decerned for the taxed amount in name of Blackwood, the defender's agent, who had disbursed the expenses. The present suspension has been brought to meet a charge on the extracted degree for the expenses, the suspender maintaining that, at the date of taxation and decerniture by the Sheriff-substitute, the cause was at an end, the same standing dismissed, in terms of the 15th section of the statute. The Lord Ordinary (Ardmillan) repelled the suspender's pleas, and refused the suspension. The Court recalled the Lord Ordinary's interlocutor, and suspended the charge for the expenses.

M.P., IRVINE'S EXECUTORS v. ORMISTON AND OTHERS.—Nov. 11.

Intestate Succession Act.

This is a competition for the moveable estate of an intestate between her cousins-german and the descendants of her cousins-german, and involves the construction to be put on the clause in the Intestate Succession Act (18 Vict., cap. 23), which provides, 'that no representation shall be admitted among collaterals, after brothers' and sisters' descendants.'

The Lord Ordinary (Neaves) pronounced the following interlocutor:—

'*Edinburgh*, 14th January 1862.—The Lord Ordinary having heard parties' procurators, and considered the closed record and whole process, ranks and prefers the six claimants, Michael Broad, etc., to the whole of the fund *in medio*, in terms of their claim, No 11 of process; repels the

claims of the whole other claimants, and decerns; finds the said six claimants before-named entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and to report. (Signed) 'CHARLES NEAVES.'

The Court now unanimously adhered, on the grounds stated in his Lordship's note, as has already been reported in this Journal (Feb. 1862).

MORRISON v. M'LEAN'S TRUSTEES.—Nov. 20.

Process—New Trial—Extended Sittings.

This case was tried during the summer sittings, when the jury returned a verdict for the defenders. The pursuer now moved to have the judge's notes printed, with the view to a motion for a new trial. The defenders objected to the motion, on the ground that notice of it had not been given within six days of the commencement of the extended sittings of the present session. By the statute it is provided that notice of such a motion must be given within six days of the ensuing session. The Court, however, held that as the sole purpose of the extended sittings, as defined by the Act of Sederunt, was the hearing of cases in the Long Roll of the two Divisions, and as the extension had no effect on the general business of the Court, it was sufficient that notice had been given within six days of the ordinary meeting. Their Lordships, therefore, disallowed the defenders' objection, and ordered the judge's notes to be printed.

Pet., DUFF.—Nov. 22.

Entail—Consigned Money.

The late Mr Duff, of Fetteresso, having L.7343, 10s. 4d. of consigned railway compensation money to invest in the purchase of land, acquired the lands of Nether Kirkland and others, for which he paid L.7723, 5s. In the conveyance of these lands to the heirs of entail, he inserted a reservation of right to claim the L.379, 14s. 8d., being the difference between the consigned sum and the price of the lands, out of any further sum to be paid by the railway company for any further land that might be taken from the entailed estate. The railway company did acquire more land, the price of which, L.307, 10s., is at present consigned in bank. The late Mr Duff, in June 1861, presented a petition for authority to uplift and apply the consigned sum in repayment, *pro tanto*, of the said sum of L.379, 14s. 8d. In December 1861, the petitioner died, and was succeeded in his entailed estates by his nephew, the present Mr R. W. Duff, M.P., who applied to be sisted in the petition. The junior Lord Ordinary refused to sist him; but, on a reclaiming note, the Court recalled the interlocutor, and sisted Mr R. W. Duff in room of his uncle.

The Lord Justice-Clerk observed that the person who was entitled to present a petition for application of consigned money was the heir of entail in possession of the estate from which the land had been sold to the railway company. The late Mr Duff held that character, and so was entitled to present the petition; and his nephew, the present Mr Duff, succeeded him in that character, and so was entitled to be sisted in the petition for the purpose of carrying it to a termination. He would give no opinion as to the merits of the petition, whether or not the application of consigning money sought to be made would be sanctioned by the Court.

Lords Cowan, Benholme, and Neaves concurred.

English Cases.

DEBTS.—A bequest of personalty, 'subject to the payment thereof of all the testator's just debts,' is a sufficient indication of intention to make the personal estate the primary fund for the payment of mortgage debts, under the 17 & 18 Vict., c. 113. *Wood, V. C.*: It is impossible to suppose that the testator did not mean to include debts due on mortgage; and I have no doubt, if the testator had been asked what his intention was, he would have said he intended the real estate to be free from the mortgage. Unless the converse of the old rule is to be imported in all its strictness into the construction of the Act of Parliament, as suggested by Lord Campbell, which I think it ought not to be, the testator has quite sufficiently expressed a contrary intention to satisfy the words of the Act.—(*Mellish v. Vallins*, 31 L. J., Ch. 592.)

CARRIER.—Plaintiff, after travelling by the line of a railway company, deposited her bag, containing wearing apparel and jewellery of the value of L.20, at the cloak-room of the railway station. On so depositing the bag, plaintiff paid the charge of 2d., and received a ticket, on the back of which was printed—'The company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2d. per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1d. per diem, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of L.10.' It did not appear whether plaintiff read this notice on the ticket, but she brought the ticket to the cloak-room when she returned there for the bag. In an action against the company for not safely keeping the bag, it was held, the Railway Traffic Act (17 & 18 Vict., c. 31, sec. 7) did not apply, as the company did not receive the bag in the capacity of carriers. Also, that the inference from the above facts was that plaintiff assented to the terms of the notice on the ticket, and that, therefore, as the value of the articles exceeded L.10, the company were not liable for their loss, although occasioned by the company's negligence.—(*Van Toll v. The South-Eastern Rail. Co.*, 31 L. J., C. P. 241.)

CARRIER.—Where the sender of a parcel by a carrier declares the nature and value of the articles in it at the time of its delivery to the carrier, if the carrier do not demand any increased rate for carriage to which he may be entitled under the Carriers' Act, and only the ordinary charge for carriage be paid, the carrier is not protected by the statute from his common law liability in case of an injury happening to the parcel during its journey. *Ex.-Ch.*, affirming the judgment below.—(*Behrens v. The Great Northern Rail. Co.*, 31 L. J., Ex. 299.)

CONTRACT.—Plaintiffs—who had contracted with the East India Company to carry out some troops for them in their ship to Bombay, and to supply the troops with provisions and stores to be used and consumed during the voyage—entered into a contract with defendant, a provision dealer, by which defendant engaged to supply plaintiff's ship with troop stores 'guaranteed to pass survey of the East India Company's officers.' Held by the *Ex. Ch.*, that this express guarantee did not exclude the guarantee which, in the absence of an express stipulation, would have been implied by law on a contract to supply, that the stores should be reasonably fit for the purpose of being used and consumed by the troops during the voyage—reversing the judgment below.—(*Bigge v. Parkinson*, 31 L. J., Ex. 301.)

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PUBLIC GENERAL STATUTES

RELATING TO SCOTLAND,

PASSED IN THE

TWENTY-FIFTH AND TWENTY-SIXTH YEARS

OF THE REIGN OF HER MAJESTY,

QUEEN VICTORIA.



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ANNO VICESIMO QUINTO ET VICESIMO SEXTO,
VICTORIÆ REGINÆ.

CAP. X.

An Act for continuing for a further limited Time, and for extending the Operation of Orders made under, 'The Industrial Schools Act, 1861,' and 'The Industrial Schools (Scotland) Act, 1861.'—[11th April 1862.]

'WHEREAS by "The Industrial Schools Act, 1861," and "The Industrial Schools (Scotland) Act, 1861," Powers are given to Justices in *England* and to Magistrates in *Scotland* to send destitute and refractory Children to Industrial Schools for such Periods as they may think necessary, for their Education and Training; but Doubts are entertained how far such Acts can be carried into operation, by reason of their Duration being limited: And whereas it is expedient that the Duration of the said Acts should be extended, and Effect should be given to Orders made for sending Children to School during the Subsistence of the Powers for that Purpose given by the said Acts: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. 'The Industrial Schools Act, 1861,' and 'The Industrial Schools (Scotland) Act, 1861,' shall respectively continue in force until the First Day of *January* One thousand eight hundred and sixty-seven, and no longer; Provided that all Orders made or to be made under either of the said Acts before the First Day of *January* One thousand eight hundred and sixty-seven, and all the Provisions of the said Acts, so far as is necessary for giving complete Effect to such Orders, shall continue in force after the First Day of *January* One thousand eight hundred and

24 & 25
Vict. c.
118, & 182

Continu-
ance of
recited
Acts and of
Orders
made under
the same.

sixty-seven, in the same Manner in all respects as if the Duration of the said Acts were not limited to the First Day of *January* One thousand eight hundred and sixty-seven.

CAP. XII.

An Act for the Protection of Inventions and Designs exhibited at the International Exhibition of Industry and Art for the Year One thousand eight hundred and sixty-two.—[29th April 1862.]

‘WHEREAS it is expedient that such Protection as is hereinafter mentioned should be afforded to Persons desirous of exhibiting new Inventions or new Designs at the International Exhibition of Industry and Art to be held in the present Year, under the Direction of “The Commissioners for the Exhibition of 1862 :” Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Short
Title.

I. This Act may be cited for all Purposes as ‘The Protection of Inventions and Designs Amendment Act, 1862.’

Protection of new Inventions.

Exhibition
of new In-
ventions
not to pre-
judice
Patent
Rights.

II. The Exhibition of any new Invention at the said International Exhibition shall not, nor shall the Publication, during the Period of the holding of such Exhibition, of any Description of such Invention, nor shall the User of such Invention, under the Direction of the said Commissioners, prejudice the right of any Person to register provisionally such Invention, or invalidate any Letters Patent that may be granted for such Invention.

Protection of Designs.

Exhibition
of Designs
not to pre-
judice Pro-
visional
Registra-
tion.

III. The Exhibition at the International Exhibition of any new Design capable of being registered provisionally under the Designs Act, 1850, or of any Article to which such Design is applied, shall not, nor shall the Publication, during the Period of the holding of such Exhibition, of any Description of such Design, prejudice the Right of any Person to register provisionally or otherwise such Design, or invalidate any Provisional or other Registration that may be granted for such Design.

CAP. XVIII.

An Act to amend the Law as to the whipping of Juvenile and other Offenders.—[16th May 1862.]

‘WHEREAS it is expedient to amend the Law relating to the whipping of Offenders:’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. Where the Punishment of Whipping is awarded for any Offence by Order of One or more Justice or Justices made in exercise of his or their Power of summary Conviction, or in *Scotland* by the Court of Justiciary, or by any Sheriff or Magistrate, the Order, Sentence, or Conviction awarding such Punishment shall specify the Number of Strokes to be inflicted and the Instrument to be used in the Infliction of them, and in the Case of an Offender whose Age does not exceed Fourteen Years, the Number of Strokes inflicted shall not exceed Twelve, and the Instrument used shall be a Birch Rod.

Regulation
as to the
whipping
of Juvenile
Offenders.

II. No Offender shall be whipped more than once for the same Offence, and in *Scotland* no Offender above Sixteen Years of Age shall be whipped for Theft, or for Crime committed against Person or Property.

Restriction
as to Whip-
pings in
Scotland,
etc.

CAP. XIX.

An Act to amend The General Pier and Harbour Act, 1861.—[16th May 1862.]

‘WHEREAS it is expedient to amend The General Pier and Harbour Act, 1861, hereinafter called the Principal Act:’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

I. This Act shall be read (as far as may be) together with the Principal Act as One Act, and may be cited as The General Pier and Harbour Act, 1861, Amendment Act.

Construc-
tion of Act.

Short Title.

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quent De-
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Documents
in Sche-
dule (B.)
Part III.

II. The Provisions of the Principal Act described in Schedule (A.) to this Act shall be repealed with respect to any Application to be made to the Board of Trade for a Provisional Order after the passing of this Act.

III. Any Persons intending to make Application to the Board of Trade for a Provisional Order relative to a Pier or Harbour, which Persons are hereinafter called the Promoters, shall in the Months of *October* and *November*, or either of them, immediately preceding the Application for the Provisional Order, publish Notice of their Intention by Advertisement according to the Regulations contained in Schedule (B.) Part I. to this Act.

IV. On or before the Thirtieth Day of *November* immediately preceding the Application for the Provisional Order, the Promoters shall deposit the Documents described in Schedule (B.) Part II. to this Act, according to the Regulations therein contained.

V. On or before the Twenty-third Day of *December* in the same Year, the Promoters shall deposit the Documents mentioned in Schedule (B.) Part III. to this Act, according to the Regulations therein contained.

II.—FUTURE OR PENDING APPLICATIONS FOR PROVISIONAL ORDERS.

Extent of
Part II. of
Act.

VI. The Provisions of this Part of this Act shall apply to every Provisional Order of the Board of Trade on any Application already made or to be hereafter made.

Works.

Approval
of Works
by Admi-
ralty.

VII. Before commencing the Construction of any Part of the Works authorized by a Provisional Order, the Undertakers shall deposit at the Admiralty Office Working Drawings of the whole Works for the Approval of the Lords of the Admiralty. The Works shall not be constructed otherwise than in accordance with such Approval. After the same are commenced or constructed, the Undertakers shall not alter or extend the same without first obtaining the like Approval. If any Work be commenced, constructed, altered, or extended contrary to this Provision, the Lords of the Admiralty may, at the expense of the Undertakers, abate and remove it, or any Part of it, and restore the Site thereof to its former Condition.

VIII. If any Work authorized by any Provisional Order be abandoned or suffered to fall into Disuse or Decay, the Lords of the Admiralty may, if and as they think fit, at the Expense of the Undertakers, either repair and restore such Work or any Part of it, or abate and remove it or any Part of it, and restore the Site thereof to its former Condition.

Abandonment, Disuse, etc., of Works.

IX. The Lords of the Admiralty may at any Time, at the Expense of the Undertakers, cause to be made a Local Survey and Examination of the Works authorized by any Provisional Order, or of the Site thereof.

Power to Admiralty to cause Local Survey to be made.

X. Whenever the Lords of the Admiralty, under the Authority of this Act, do any Act or Thing in relation to any Works authorized by any Provisional Order, which they are by this Act authorized to do at the Expense of the Undertakers, the Amount of such Expense shall be a Debt due to the Crown from the Undertakers, and shall be recoverable as such, with Costs, or the same may be recovered with Costs as a Penalty is or may be recoverable from the Undertakers.

Recovery of Expenses from Undertakers.

XI. During the Construction of the Works the Undertakers shall, at their own Expense, exhibit and keep burning every Night from Sunset to Sunrise such Lights for the Guidance of Vessels as the Lords of the Admiralty shall from Time to Time require or approve of: If the Undertakers refuse or neglect to comply with this Provision, they shall for each Offence be liable to a Penalty not exceeding Ten Pounds.

Lights to be exhibited at Night during Construction of Works.

XII. The Works authorized by any Provisional Order shall be completed within Five Years after the passing of an Act confirming the Provisional Order, or within such other Time as the Provisional Order may direct; and on the Expiration of that Period the Powers by the Order given to the Undertakers for executing the same, or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as is then completed.

Limitation of Time for Completion of Works.

Rates.

XIII. On Payment of the Rates payable under a Provisional Order, and subject to the Provisions of the Principal Act and this Act and the Provisional Order, the Pier or Harbour to which the Provisional Order relates and its Approaches shall be open to all Persons for the shipping and unshipping of Goods, and the embarking and landing of Passengers, and such Persons and Passengers shall have unobstructed Ingress, Passage, and Egress into, along, through, and out of the same.

Pier, etc., open to Public on Payment of Rates.

Power to
Board of
Trade to
revise
Rates.

XIV. Where the Undertakers are a Company incorporated by the Provisional Order for the Purposes of the Undertaking, then, if at any Time it appear to the Board of Trade that the clear annual Profits divisible on the subscribed and paid-up Capital of the Company, on the average of the then Three last preceding Years, amount to or exceed the Rate of *Ten per Centum per Annum* on the nominal Value of the Shares, the Board of Trade may, if in their Discretion they think fit, require the Company to reduce the Rates received by them to such Extent as may to the Board of Trade seem fit: If the Company refuse or neglect to comply with any such Requirement, they shall be liable to a Penalty not exceeding Fifty Pounds for every Day during which such Refusal or Neglect shall continue: Provided that if at any subsequent Time the Profits fall below the said Rate of *Ten per Centum per Annum* the Company may, with the Sanction of the Board of Trade, again raise the said Rates to an Amount not exceeding the Amount authorized by the Provisional Order.

Company
to send
Copy of
annual
Account in
abstract as
to Rates,
Vessels,
etc., to
Board of
Trade.

XV. Where the Undertakers are a Company as aforesaid, the Company, within One Month after sending to the Clerk of the Peace for the County the Copy of their annual Account in abstract, shall send a Copy of the same to the Board of Trade, who shall forward a Copy to any Persons who may require the same: If the Company refuse or neglect to comply with this Provision, they shall for every such Refusal or Neglect be liable to a Penalty not exceeding Twenty Pounds.

As to Audit
of Accounts
on Com-
plaint to
Board of
Trade.

XVI. If, on Complaint in Writing by any Person interested, it appear to the Board of Trade that there is reasonable Ground for believing that such last-mentioned Account has not been duly kept, or that any Rates have been improperly or unfairly levied by the Company, or have not been applied in accordance with the Order, then the following Provisions shall take effect:

- (1.) The Board of Trade may appoint an Auditor to audit and examine such Account, and inquire into the matters complained of, and report to the Board of Trade on such Account and Matters:
- (2.) The Company shall on Demand produce to such Auditor all or any of their Accounts, Books, Deeds, Papers, Writings, and Documents, and afford to him all reasonable Facilities for examining and comparing the same:
- (3.) In case any such Complaint be found to be true, the reasonable Expenses of the Auditor shall be paid to the Board of Trade by the Company:
- (4.) In case any such Complaint be not found to be true,

the reasonable Expenses of the Auditor shall be paid to the Board of Trade by the Complainant:

- (5.) In either Case, such Expenses shall be a Debt due to the Crown from the Company or from the Complainant (as the case may be), and shall be recoverable as such, with Costs, or the same may be recovered with Costs as a Penalty is recoverable from the Company, or from any Person liable to a Penalty under the Provisional Order (as the Case may be).

XVII. All Rates levied under any Provisional Order shall be charged equally to all Persons with respect to the same Description of Vessels and the same Description of Goods.

Rates to be
equally
levied.

XVIII. Without Prejudice to any other Remedy, the Undertakers may recover any Rates due in respect of a Vessel from the Owner or Master of such Vessel, and any Rates due in respect of Goods from the Owner or Consignee of such Goods, by Proceedings in any Court of competent Jurisdiction.

Mode of
Recovery
of Rates.

General Provisions.

XIX. Subject to the Provisions of the Principal Act and this Act and any Provisional Order, The Harbours, Docks, and Piers Clauses Act, 1847, shall be deemed to be incorporated with every Provisional Order.

10 & 11
Vict., c. 27,
incorporated.

XX. The Undertakers may grant or allow to any Persons the Right of laying down or constructing and maintaining Pipes or Channels for the Conveyance of Water to, on, and within the Pier or Harbour, and may demand and receive such Sums in consideration of such Grant or Allowance as they may think reasonable.

Water
Pipes.

XXI. The Undertaking authorized by any Provisional Order shall be subject to the Provisions of the Merchant Shipping Act, 1854, and of every General Act relating to Harbours or Dues on Shipping or on Goods carried in Ships, now in force or hereafter to be passed, and to any future Revision or Alteration under the Authority of Parliament of the Rates authorized by the Order.

Applica-
tion of
Merchant
Shipping
Act, etc.

XXII. The Costs of and connected with the Preparation and making of each Provisional Order shall be paid by the Promoters.

Costs of the
Order.

III.—PENDING APPLICATIONS FOR PROVISIONAL ORDERS.

XXIII. 'And whereas it was by the Principal Act (Section Nine) enacted, that in case the Promoters, or any Persons being the Owners or Proprietors of any Works, or

Proceed-
ings under
Section 9
of Principal

Act for
fixing
Schedule
of Rates.

any Persons having the Management of or Powers to construct any such Works under any Local Act of Parliament, or any Town Council of any Seaport Town not having any constituted Harbour Trust, should be desirous of levying any Rates for the Maintenance of such Works, or of altering the Schedule of Rates then leviable thereat, they should prepare a Schedule of such Rates which they might think reasonable and proper to be levied at such Works, and should publish such Schedule in a Newspaper as therein specified, and should also deposit a printed Copy of such Schedule at such Office as therein specified, and also transmit a Copy of such Schedule to the Board of Trade with such other Documents as therein specified, and that after such Proceedings and the Lapse of such Time as therein specified the Board of Trade should finally adjust and fix a Schedule of Rates, not exceeding the Rates specified in the Schedule to the Burgh Harbours (*Scotland*) Act, 1853, and that thereupon the Board of Trade might by Provisional Order empower any of the Persons in the Section now in recital mentioned to levy Rates according to such Schedule :

‘ And whereas under the said recited Provision, Persons within the Description therein contained have prepared Schedules of Rates which they thought reasonable and proper to be levied, and have published, deposited, and transmitted the same in manner by the said recited Provision required, but the Board of Trade on proceeding to finally adjust and fix Schedules of Rates have, in certain Cases, found that the Schedules so prepared, published, deposited, and transmitted comprise Rates in some Instances exceeding the Rates specified in the Schedule to The Burgh Harbours (*Scotland*) Act, 1853, and in other Instances leviable in respect of Subjects not specified in the last-mentioned Schedule :

‘ And whereas in the several Cases aforesaid it is represented to the Board of Trade by the Promoters, and the Board of Trade have no Reason to doubt, that it is essential to the Success of the several Undertakings that an Opportunity should be given to the Promoters of obtaining the Sanction of Parliament to the several Schedules of Rates so prepared, published, deposited, and transmitted as aforesaid, without reference to the Conformity of such Schedules with the Schedule to The Burgh Harbours (*Scotland*) Act, 1853 :’ Be it therefore enacted as follows :

Power to
Board of
Trade to
authorize

Where any Schedule of Rates has been prepared, published, deposited, and transmitted as aforesaid, and it appears to the Board of Trade to be expedient that the

same, or the same as modified on any Objection taken under the Principal Act, should be authorized by a Provisional Order, it shall be lawful for the Board of Trade to finally adjust and fix a Schedule of Rates, not exceeding the Rates specified in the Schedule so prepared, published, deposited, and transmitted, or so modified, and thereupon by Provisional Order to authorize the Levying and Recovery of Rates according to the Schedule so finally adjusted and fixed, notwithstanding that the same may in any respect differ from the Schedule to The Burgh Harbours (*Scotland*) Act, 1853: Provided that it shall be lawful for the Board of Trade, if in any Case they think fit, before finally adjusting and fixing any such Schedule, to require the Promoters to publish any further or other Notice relative to the proposed Schedule as the Board of Trade may direct.

Schedule as published, though differing from Schedule referred to in Principal Act.

XXIV. The Provisions of the Principal Act described in Schedule (C.) to this Act shall be repealed with respect to any Application already made to the Board of Trade for a Provisional Order.

Provisions of Principal Act as in Schedule (C.) to this Act repealed.

IV.—GENERAL PROVISIONS.

XXV. The Board of Trade shall not make any Provisional Order taking away or abridging any Right, Privilege, Power, Jurisdiction, or Authority given or reserved to any Person or Corporation by any Local or Special Act of Parliament, without the Consent in Writing of such Person or Corporation; but, subject to this Restriction, and to the Provisions of the Principal Act, and of this Act, every Provisional Order when duly confirmed by Parliament shall be of full Force and Effect, any Local or Special Act to the contrary notwithstanding.

Order not to be made affecting Powers under Local Acts without Consent.

XXVI. Every Provisional Order of the Board of Trade on any Application already made or to be hereafter made shall take effect subject and according to such Restrictions and Provisions, and on such Terms and Conditions, as may be therein specified, not being inconsistent with the Provisions of the Principal Act or this Act.

Power to Board of Trade to impose Terms, etc.

XXVII. The Provisions of the Act of the Session of the Seventh Year of King *William* the Fourth and the First Year of Her Majesty, Chapter Eighty-three, 'to compel Clerks of the Peace for Counties and other Persons to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament,' shall (as far as may be) apply to all Cases of Deposit of Documents made or to be made with any Person under the Principal Act or this Act.

Application of 7 W. 4 & 1 Vict. c. 83, to Act.

SCHEDULES.

SCHEDULE (A.)

Parts of General Pier and Harbour Act, 1861, repealed as to future Applications to the Board of Trade for Provisional Orders.

- (1.) Sections Five, Nine.
- (2.) In Section Six, so much as requires any Deposit to be made at the Admiralty Office.
- (3.) In Section Sixteen, so much as relates to the London, Edinburgh, or Dublin Gazette.

SCHEDULE (B.)

PART I.

Advertisement in October or November of intended Application.

- (1.) Every Advertisement is to state—
 1. The Objects of the intended Application, specifying any of the following Objects, when comprised among the Objects of the Application :
 - (a.) Extension of Time for the Completion of any Works already authorized :
 - (b.) Power for a Company to amalgamate with another :
 - (c.) Power to sell, purchase, lease, or take on Lease an Undertaking :
 - (d.) Amendment or Repeal of any Local or Special Act of Parliament, or of any former Provisional Order :
 - (e.) Power to levy any Tolls, Rates, or Duties, or to alter any existing Tolls, Rates, or Duties :
 - (f.) The conferring, varying, or extinguishing of any Exemption from Tolls, Rates, or Duties, or of any other Right or Privilege :
 - (g.) Constitution or Alteration of Constitution of any Harbour Authority :
 2. A general Description of the Nature of the proposed new Works, if any.
 3. The Names of the Parishes, Townlands, Townships, and Extra-parochial Places in which the proposed new Works, if any, will be made.
 4. The Times and Places at which the Deposit under Part II. of the Schedule will be made.
 5. An Office, either in London, or at the Place to which the intended Application relates, at which printed Copies of the Draft Provisional Order, when deposited, will be purchasable as hereinafter provided.

(2.) The whole Notice is to be included in One Advertisement, which is to be headed with a short Title descriptive of the Undertaking or Application.

(3.) The Advertisement is to be inserted once at least in each of Two successive Weeks in some One and the same Newspaper published in the City, Town, or Place where the proposed Works will be made, or where the Pier or Harbour to which the intended Application relates is situate; or if there be no such Newspaper, then in some One and the same Newspaper published in the County in which such City, Town, or Place, or some Part thereof, is situate; or if there be none, then in some One and the same Newspaper published in some adjoining or neighbouring County.

(4.) The Advertisement is also in every Case to be inserted once at least in the London Gazette if the Place to which the intended Application relates is situate in England or Wales, in the Edinburgh Gazette if such Place is situate in Scotland, or in the Dublin Gazette if such Place is situate in Ireland.

PART II.

Deposit on or before 30th November.

(1.) The Promoters are to deposit—

1. A Copy of the Advertisement published by them.

2. A proper Plan and Section of the proposed new Works, if any; such Plan and Section to be prepared according to such Regulations as may from Time to Time be made by the Board of Trade in that Behalf.

(2.) The Documents aforesaid are to be deposited for public Inspection—

1. In England or Ireland, in the Office of the Clerk of the Peace for every County, Riding, or Division; in Scotland, in the Office of the Principal Sheriff-Clerk for every County, District, or Division,—in which any proposed new Work will be made, or in which the Pier or Harbour to which the intended Application relates, or any Part thereof, is situate.

2. At the Custom House, if any, of the Port, Sub-Port, or Creek to which the intended Application relates.

(3.) The Documents aforesaid are also to be deposited in the Offices of the Admiralty and of the Board of Trade.

PART III.

Deposit on or before 23d December.

(1.) The Promoters are to deposit at the Office of the Board of Trade—

1. A Memorial of the Promoters, signed by them or One of them, headed with a short Title descriptive of the Undertaking or

Application (corresponding with that at the Head of the Advertisement), addressed to the Board of Trade, and praying for a Provisional Order.

2. A printed Draft of the Provisional Order as proposed by the Promoters.

3. An Estimate of the Expense of the proposed new Works, if any, signed by the Person making the same.

(2.) They are also to deposit printed Copies of the Draft Provisional Order for public Inspection at the Custom House (if any) of the Port, Sub-Port, or Creek to which the Application relates.

(3.) They are also to deposit a sufficient Number of such printed Copies at the Office named in that Behalf in the Advertisement; such Copies to be there furnished to all Persons applying for them at the Price of not more than One Shilling each.

SCHEDULE (C.)

Parts of General Pier and Harbour Act, 1861, repealed as to Application already made to the Board of Trade for Provisional Orders.

In Section Sixteen, so much as relates to the London, Edinburgh, or Dublin Gazette, and also so much as restricts the Time for the Introduction of a Bill into Parliament for the Confirmation of a Provisional Order.

CAP. XXXV.

An Act to amend the Acts for the Regulation of Public Houses in Scotland.—[7th July 1862.]

‘ WHEREAS an Act was passed in the Ninth Year of the Reign of His Majesty King George the Fourth, intituled
 9 G. 4, c. 58. *An Act to regulate the granting of Certificates by Justices of the Peace and Magistrates, authorizing Persons to keep Common Inns, Alehouses, and Victualling Houses in Scotland, in which Ale, Beer, Spirits, Wine, and other Exciseable Liquors may be sold by Retail under Excise Licences, and for the better Regulation of such Houses, and for the Prevention of such Houses being kept without such Certificate;*
 and another Act was passed in the Sixteenth and Seventeenth Years of the Reign of Her present Majesty, intituled
 16 & 17 Vict., c. 67. *An Act for the better Regulation of Public Houses in Scotland:* And whereas it is expedient to amend the said Acts, and to make provision for more effectually preventing the Sale of Exciseable Liquors without Certificate and Licence,

and for other Purposes relating thereto:’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. The Magistrates of Burghs shall meet for granting and renewing Certificates for the Sale of Exciseable Liquors within the Bounds of such Burghs upon the Second *Tuesday* of *April* and the Third *Tuesday* in *October* in each Year, and the Justices of the Peace for the several Counties or Districts shall meet for granting and renewing Certificates for the Sale of Exciseable Liquors within such several Counties or Districts on the Third *Tuesday* of *April* and the last *Tuesday* of *October* in each Year; and it shall be lawful for such Magistrates and Justices respectively to adjourn such Meetings from Time to Time, as they shall think fit, during the Period of One Month next after the Day of their First Meeting, but no longer.

Regulating
Period for
granting
Certificates.

II. The Forms of Certificates contained in Schedule (A.) to this Act annexed shall come in place of the Forms of Certificates provided by the recited Acts or either of them; and it shall be lawful for the Justices of the Peace for any County or District, or the Magistrates of any Burgh, where they shall deem it inexpedient to grant to any Person a Certificate in the Form applied for, to grant him a Certificate in any other of the Forms contained in the said Schedule: Provided always, that in any particular Locality within any County or District or Burgh requiring other Hours for opening and closing Inns and Hotels and Public Houses than those specified in the Forms of Certificates in said Schedule applicable thereto, it shall be lawful for such Justices or Magistrates respectively to insert in such Certificates such other Hours, not being earlier than Six of the Clock or later than Eight of the Clock in the Morning for opening, or earlier than Nine of the Clock or later than Eleven of the Clock in the Evening for closing the same, as they shall think fit: And the Penalties and Forfeitures provided by the recited Acts, or either of them, for Breaches of or Offences against the Terms, Provisions, and Conditions of Certificates, shall apply to Breaches of or Offences against the Terms, Provisions, and Conditions of Certificates granted under this Act.

Forms of
Certificates.

Penalties
for Breaches
of Certificates.

III. Every Certificate to be hereafter granted for the Sale by Retail in any House or Premises of Spirits or Wine shall include an Authority for the Sale by Retail in such House or Premises of Porter, Ale, Beer, Cyder, and Perry, and such Certificate shall have the Effect of enabling the Party in favour of whom the same shall have been granted

Certificates
for the Sale
of Spirits
and Wine,
to include
Authority
to sell Por-
ter, Ale,
Beer, etc.

to obtain any Licence or Licences for such Purposes: Provided always, that nothing herein contained shall be held to prevent the Justices or Magistrates from granting a Certificate in any of the Forms in the said Schedule contained for the Sale by Retail of Wine, Porter, Ale, Beer, Cyder, or Perry, or of Porter, Ale, Beer, Cyder, or Perry only.

Certificates
granted
contrary to
this Act
void.

Licences
not to be
granted
without
a Certifi-
cate ob-
tained un-
der this Act.

IV. If any Certificate shall be granted contrary to the Terms and Provisions of this Act, the same shall be null and void to all Intents and Purposes.

V. No Licence for the Sale of Spirits, Wine, Porter, Ale, Beer, Cyder, Perry, or other Exciseable Liquors by Retail, whether to be drunk or consumed on the Premises of the Person licensed or not, shall be granted by the Commissioners of Inland Revenue, or by any Officer of Inland Revenue, to any Person in *Scotland* who shall not produce to the said Commissioners or Officer a Certificate granted in Terms of this Act, enabling the Party to obtain such Licence, and every Licence which shall be granted contrary to the Terms of this Act shall be null and void to all Intents and Purposes.

Chief Ma-
gistrate or
Justices on
special Oc-
casions
may grant
Permission
to keep
Houses,
etc., open
during par-
ticular
Times.

VI. On a Representation being made to the Chief Magistrate, or failing him the Two Senior Acting Magistrates of any Burgh, or to any Two Justices of the Peace of any County respectively, by any Person holding a Certificate for keeping an Inn and Hotel or Public House, and duly licensed to sell Exciseable Liquors to be consumed on the Premises, that it is intended that any public or special Entertainment shall take place therein, or in any other Place or Premises situated within the respective Jurisdictions of such Chief Magistrate or Magistrates or Justices, during any particular Time, such Chief Magistrate or Magistrates or Justices, as the Case may be, may, if he or they shall think fit, and on being satisfied that such Inn and Hotel, or Public House, Place, or Premises possesses the necessary Accommodation, and that the Entertainment is for a public or special Occasion of a legitimate and proper Character, and not originating directly or indirectly with the Person holding such Certificate, grant such Person a special Permission in Writing to keep such Inn and Hotel, or Public House, Place, or Premises open, and to sell therein, on such public or special Occasion, and for that Purpose only, such Exciseable Liquors as he may be duly licensed to sell as aforesaid during such Time, and beyond the Hour prescribed by his Certificate for closing, *Sunday* excepted, and under such Regulations as such Chief Magistrate or Magistrates or Justices of the Peace shall think fit to appoint: Provided always, that such Magistrate

or Magistrates or Justices are entitled to grant Certificates, and that such Justices are also Heritors of or resident in the Parish in which such Inn and Hotel, Public House, Place, or Premises shall be situated, or, where there shall be no such Justices Heritors of or resident in such Parish, Heritors of or resident in some next adjacent Parish; and it shall be lawful for the Justices of the Peace of any County or District, or for the Magistrates of any Burgh, at any *April* Half-yearly Meeting for the granting and Renewal of Certificates, to make such general Regulations touching such Permissions as they shall think fit, and such special Permissions shall be subject to such general Regulations: And provided further, that the Person obtaining such special Permission shall lodge the same with the Superintendent or other Chief Officer of Police of the District at least Twenty-four Hours before the Commencement of such public or special Entertainment, and such Superintendent or Chief Officer of Police shall furnish such Person with a certified Copy thereof, which shall be shown to any Officer of Police or Constable requiring to see the same: And provided also, that the Party holding such special Permission shall also have obtained an occasional Excise Licence in that Behalf.

VII. 'Whereas by an Act passed in the last Session of Parliament, intituled *An Act for granting to Her Majesty certain Duties of Excise and Stamps*, it is enacted, "that it shall be lawful for any Person to take out a Licence for the Sale in any House or Shop of Table Beer at a Price not exceeding One Penny Halfpenny the Quart, and not to be drunk or consumed on the Premises where sold, and that it shall not be necessary to the obtaining of such Licence that the said House or Shop shall be rated to the Relief of the Poor to any Amount, or that the Person applying for such Licence shall produce any Certificate or enter into any Bond required by any Act relating to the Sale of Beer by Retail:" And whereas it is expedient that Provision should by this Act be made for the proper and orderly Regulation of the Houses, Shops, and Premises kept by such Persons: Be it therefore enacted, That every such Licence shall be held by the Person who shall have obtained the same on the Terms, Provisions, and Conditions following; viz., that he shall not knowingly permit any Breach of the Peace or riotous or disorderly Conduct within his Premises, or supply Liquors to Persons in a State of Intoxication, and shall not sell or give any such Table Beer to be drunk or consumed on the said Premises; and shall not sell or give out therefrom any such Table Beer before Eight of the Clock in the Morning or after

Persons
holding Li-
cences for
the Sale of
Table Beer
to be sub-
ject to the
same Con-
ditions as
Persons
holding
Certificates.

Eleven of the Clock at Night of any Day ; and shall not open his Premises for the Sale of any Table Beer, or any Goods or Commodities whatsoever, or sell or give out the same on *Sunday* ; and lastly, shall maintain good Order and Rule within his Premises ; and in case any Person holding any such Licence shall offend against any of the said Terms, Provisions, and Conditions, every Person so offending shall for every such Offence forfeit and undergo the several Penalties provided by the Twenty-first Section of the herein first-recited Act for the Punishment of Offences against the Terms and Conditions of Certificates ; and in addition to such Penalties the Licence granted to such Person may be declared to be forfeited and to become null and void ; and every such Offence shall be prosecuted, tried, and determined in the same Manner, and before the same Courts, and subject to the same Conditions, as Breaches of Certificate or Offences against the Terms and Conditions thereof may be prosecuted, tried, and determined.

Form of
Applica-
tions for
Certificates.

VIII. If any Person shall be desirous of keeping an Inn and Hotel, Public House, Shop, or Premises for the Sale therein of Spirits, Wine, Beer, or other Exciseable Liquors, whether to be consumed on the Premises or not, he shall, previous to the granting to him of a Certificate for that Purpose, or the Renewal of any such Certificate already granted, truly fill up an Application for such Certificate in the Form contained in the First Part of Schedule (B.) to this Act annexed, and shall truly answer the several Queries therein contained ; and Printed Forms for such Application shall be supplied to the Applicant by the Clerk of the Peace for the County or District, or the Town Clerk of the Burgh in which such Inn and Hotel, Public House, Shop, or Premises shall be situate, upon Payment to him of a Fee of Sixpence for each Copy thereof, and every such Application shall be filled up in a fair and legible Hand, and shall be signed by the Applicant or his Agent thereunto authorized, and shall be lodged by the Applicant with such Clerk of the Peace or Town Clerk, as the Case may be, Fourteen Days at least before the General Meeting of the Justices of the Peace or Magistrates for granting and renewing Certificates : Provided always, that it shall not be lawful for the Justices of the Peace of any County or District, or the Magistrates of any Burgh, to entertain any Application for any Certificate for the Sale of Exciseable Liquors with respect to any House or Premises not licensed, and for which there is no Certificate at the Time of making such Application, until a Report shall have been made and subscribed by a Justice of the Peace for such County or District, or a Magistrate of such Burgh respectively, such

Justice or Magistrate being entitled to grant Certificates, stating that the same are of suitable Construction and Accommodation for the Purpose applied for, and accompanied with a Certificate as to the Applicant's Character and Qualification, signed by a Justice of the Peace for such County or District, or a Magistrate of such Burgh, and which said Report and Certificate respectively shall be in the Form, or as nearly as may be in the Form, contained in the Second Part of Schedule (B.) to this Act annexed: Provided also, that the Justices in Quarter Sessions, to whom any appeal shall be made from a Deliverance, granting or refusing any Application for a Certificate, may by themselves, or any One or more of their Number, inspect the Premises for which a Certificate is applied, and review the said Report.

LX. Where any Person shall be desirous of obtaining a Renewal of any subsisting Certificate, granted to him in Terms of this Act, which has not been transferred during the current Half Year, it shall not be necessary that he produce along with his Application any Recommendation or Certificate of Character and Qualification: Provided always, that such Exemption shall not be held to interfere with the Powers of Justices and Magistrates under the said recited Acts or this Act to deal with such Application.

Certificate of Character and Qualification not necessary with Application for Renewal of Certificate.

X. The Clerk of the Peace of every County or District and the Town Clerk of every Burgh shall, at least Ten Days before the General Meeting of the Justices of the Peace, or the Magistrates, as the Case may be, for the granting and Renewal of Certificates for the Sale of Exciseable Liquors, make out and advertise, at least twice in One or more Newspapers printed or generally circulated in the District, a complete List, in the Form, or as nearly as may be in the Form, set forth in Schedule (C.) to this Act annexed, of all Applications for Certificates within their respective Bounds for Premises not at the Time certificated; and of all Applications by new Tenants or Occupants of Premises at the Time certificated; and also of all Applications for Renewal of Certificates which have been transferred during the Currency of the previous Half Year; and such Clerks of the Peace shall also, within the said Time, transmit by Post, with Postage prepaid, to the Registrar or Registrars of every Parish within their respective Counties or Districts, a Copy of the List of such Applications in so far as applicable to the Parish of such Registrar or Registrars, who are hereby required to preserve the same, and to give Access thereto to any Party applying for Inspection thereof upon Payment of a Fee of

List of new Applications for Certificates to be published.

Power to Justices, etc., to cause descriptive Lists to be printed of Persons to whom Certificates have been granted.

Certain Parties may object to the granting or Renewal of Certificates.

One Shilling for such Inspection: And it shall be lawful for the Justices of the Peace of any County or District, or the Magistrates of any Burgh, at any *April* Half-yearly Meeting for the granting and Renewal of Certificates, if they shall think fit, to cause a descriptive List of Persons to whom Certificates shall have been granted for the Year next ensuing, with the Premises to which such Certificates apply, within their respective Jurisdictions, to be made up and printed, in such Form as they shall direct, for the Use of themselves and others concerned in the Execution of the said recited Acts and this Act, the Expense whereof shall be paid out of the respective Funds in this Act specified into which Penalties and Expenses shall be paid.

XI. Any Person or the Agent of any Person owning or occupying Property in the Neighbourhood of the House or Premises, in respect of which any Certificate or Renewal of any Certificate shall be applied for, may object to the granting or Renewal of such Certificate by lodging at any Time, not less than Five Days before the General Meeting of the Justices of the Peace or Magistrates of the County, District, or Burgh, for the granting and Renewal of Certificates, where such House or Premises shall be situated, with the Clerk of the Peace or Town Clerk, as the Case may be, a Notice in Writing to that Effect, signed by such Person or his Agent, specifying the Grounds of such Objection, which Objection shall be heard at the then ensuing General Meeting; and if such Objection shall be considered of sufficient Importance by the Justices of the Peace or Magistrates in such General Meeting, and shall be proved to their Satisfaction, the said Certificate shall not be granted or renewed: Provided always, that no such Objection shall be entertained unless it shall be proved or admitted that the Person so objecting or his Agent did, at least Five Days before such General Meeting, deliver or cause to be delivered to the Person applying for such Certificate a Copy of the aforesaid Notice, or did forward to him by Post, with Postage prepaid, or did leave for him a Copy thereof, addressed to him at his Place of Abode mentioned in his Application, or in the Case of an Application for the Renewal of any Certificate at the licensed Premises for which the Application is made; and it shall be lawful for the Justices of the Peace or Magistrates respectively, in the event of their considering the Allegations and Objections against a Renewal of a Certificate contained in any such Notice frivolous or vexatious, or unauthorized, to find the Person or Agent, as the Case may be, making the same liable in such Expenses as they shall deem proper, and the Amount of the Expenses so found due shall be recoverable

in the Sheriffs or Justices of the Peace Small Debt Court having Jurisdiction in the District; and a certified Copy of the aforesaid finding shall be sufficient Evidence and Authority for decerning for the Amount thereof with Expenses.

XII. It shall be lawful for the Justices of the Peace of any County or District, or for the Magistrates of any Burgh, at any General Meeting for the granting and Renewal of Certificates held within their respective Jurisdictions, to hear and determine as at present, and without the Notice required by Section Eleven, any Objections to be made verbally or in Writing by any Justice of the Peace or Magistrate, or by the Procurator Fiscal, Chief Constable, or Superintendent of Police, against the granting or renewing of any Certificate.

Justices or Magistrates at General Meetings may hear Objections to granting Certificates.

XIII. It shall be lawful for any Chief Constable, Superintendent, Lieutenant, or Inspector of Police at any Time to enter and inspect any Eating House, Toll House, Temperance Hotel, Shop, or other Place, or any Boat or Vessel, where Food or Drink of any Kind is sold to be consumed on the Premises, or in which he shall have Reason to believe that Exciseable Liquors of any Kind are being unlawfully trafficked in; and it shall also be lawful for any Constable of Police having an Authority in Writing from any Justice of the Peace or Magistrate, or from any Chief Constable, Superintendent, Lieutenant, or Inspector of Police in any County, District, or Burgh, and which they are severally hereby authorized to grant, to enter and inspect any such Eating Houses, Toll Houses, Temperance Hotels, Shops, or Places, or any such Boats or Vessels, within such County, District, or Burgh respectively, at any Time or Times within Eight Days from the Date of such Writing, as may be specially mentioned in such Writing; and any Person who shall refuse to admit or shall not admit such Officer of Police or Constable into any such Eating House, Temperance Hotel, Shop, or other Place, Boat or Vessel, or shall offer Obstruction to his Admission thereto, shall thereby be guilty of an Offence, and may be apprehended on a Warrant to that Effect granted by the Sheriff or by any One Justice of the Peace or Magistrate, and on being convicted thereof shall forfeit and pay a Penalty not exceeding Ten Pounds, and failing immediate Payment shall be imprisoned for a Period not exceeding Sixty Days: And it shall be lawful for any Officer of Police or Constable of any County, District, or Burgh, without any written Authority, at any Time to enter and inspect any licensed Inn and Hotel or Public House therein situated, and also, where he shall have Reason to believe

Power to Constables, etc., to enter Eating Houses, etc., if they believe Exciseable Liquors are trafficked in.

Penalty for obstructing Officers of Police, etc.

that a Breach of Certificate is being committed, at any Time without written Authority to enter and inspect the Premises of any Grocer or Provision Dealer trading in Exciseable Liquors; and any Person who shall refuse to admit or shall not admit such Officer of Police or Constable into such licensed Inn and Hotel, Public House, or Premises, or shall offer Obstruction to his Admission thereto, shall thereby be guilty of an Offence, and on being convicted thereof shall forfeit and pay a Penalty not exceeding Ten Pounds, and failing immediate Payment of such Penalty shall be imprisoned for a Period not exceeding Sixty Days.

Police to report Persons licensed, from whose Premises Persons in a State of Intoxication have been seen frequently to issue, or against whom there is other Cause of Complaint.

XIV. The Chief Officer of Police of every County, District, Place, and Burgh in *Scotland* shall, on the first lawful Day of every Week, transmit or cause to be transmitted to the Procurator Fiscal appointed by the Justices of the Peace of such County or District, or Procurator Fiscal appointed by the Magistrates of such Burgh, respectively, a written Report containing the Names of all Persons licensed to sell Exciseable Liquors by Retail, from whose Premises Persons in a State of Intoxication have been frequently seen to issue, and of the Manner in which any special Permission granted in virtue of this Act has been exercised, and such Reports shall be brought by such Procurator Fiscal under the Consideration of the Justices of the Peace and Magistrates of every such County and Burgh respectively when assembled to grant and renew Certificates: Provided always, that within Two Days after such Report shall have been lodged with such Procurator Fiscal Notice in Writing, by Post, with Postage prepaid, shall be sent by him, addressed to each licensed Person at his licensed Premises, of his having been so reported on; and such Chief Officer of Police shall also, without undue Delay, report to the Procurator Fiscal or other Party by this Act directed to prosecute Offenders all Offences committed against the recited Acts and this Act, or any of them, coming to his Knowledge, and shall at all Times use the Means within his Control for the Detection, and, when necessary, the Apprehension of all Offenders.

Permitting drinking Exciseable Liquors in a neighbouring House, Shed, etc., with Intent to evade the Provisions of the Act to be

XV. If any Person licensed to sell, by Retail, any Exciseable Liquors, not to be consumed on the Premises, shall take or carry, or authorize or permit or suffer to be taken or carried, any such Exciseable Liquors out of or from the House, Shop, or Premises of such licensed Person, for the Purpose of being sold or hawked on his Account, or for his Benefit or Profit, or for the Purpose of being drunk or consumed for his Benefit or Profit in any other House, or in any Tent, Shed, or other Premises, of

any Kind whatever, belonging to such Person, or hired, used, or occupied by him, or in which he may be interested, such Exciseable Liquors shall be deemed and taken to have been drunk or consumed upon the Premises of the Person so licensed, and such Person shall be deemed guilty of a Breach of his Certificate, and shall be liable in the Penalties and Expenses and Forfeitures for such Offence, as by the recited Acts and this Act provided.

deemed
drinking on
the Pre-
mises.

XVI. Every Person hawking Spirits or other Exciseable Liquors shall thereby be guilty of an Offence, and may be taken into Custody by any Constable or Officer of Police, or, in the Absence of any Constable or Officer of Police, by any Person whomsoever, and may be detained in any Police Office or Station House, or other convenient Place, and not later than in the course of the first lawful Day after he shall have been so taken into Custody shall be brought before a Justice of the Peace or Magistrate, or if not so taken into Custody, or if he shall have been liberated on Bail or Pledge, may be summoned to appear before a Justice of the Peace or Magistrate, and on being convicted of such Offence shall forfeit and pay a Penalty not exceeding Ten Pounds, and in default of immediate Payment shall be imprisoned for a Period not exceeding Sixty Days.

Persons
hawking
Exciseable
Liquors
may be
appre-
hended, and
on convic-
tion to be
fined or im-
prisoned.

XVII. Every Person trafficking in any Spirits or other Exciseable Liquors in any Place or Premises without having obtained a Certificate in that Behalf in Terms of this Act shall be guilty of an Offence, and on being convicted thereof shall for each such Offence forfeit and pay the full Penalties provided in the Thirtieth Section of the said first-recited Act, together with the Expenses of Prosecution and Conviction; and in Default of immediate Payment thereof shall be imprisoned for the entire Periods respectively prescribed by the said Thirtieth Section of the said first-recited Act: Provided always, that the Penalty and Term of Imprisonment thereby provided for a Third Offence shall likewise be imposed in the Case of every subsequent Offence.

Penalty on
Persons
trafficking
in Excise-
able
Liquors
without a
Certificate.

XVIII. In the Case of any Person complained of for any Offence against the recited Acts or this Act, excepting for Breach of Certificate, it shall be lawful for any Sheriff, or any One Justice or Magistrate to or before whom such Complaint shall have been presented, unless by this Act otherwise provided, to grant Warrant for summoning the Person complained of, upon an Induciae of not less than Forty-eight Hours, to appear to answer to such Complaint at a Time and Place to be therein specified; and in the Case of any Person complained of for trafficking in Spirits

Sheriff,
Magistrate,
or Justice
may grant
Warrant to
summon,
and War-
rant to
apprehend.

or other Exciseable Liquors in any Place or Premises without having obtained a Certificate in that Behalf, it shall be lawful for any Sheriff or any One Justice or Magistrate, if he shall see fit, instead of granting Warrant to summon such Offender, to grant Warrant to apprehend such Offender, to answer to the Complaint, and to be further dealt with as is provided by said recited Acts and this Act.

Proof of
trafficking
in any
Shebeen.

Persons
found in
Shebeens
drunk or
drinking
may be
taken into
Custody.

Warrant
may be
granted to
seize Ex-
ciseable
Liquors
found in
unlicensed
Premises.

XIX. In order to warrant the Conviction of any Person for trafficking in any Spirits or other Exciseable Liquors in any Place or Premises without a Certificate in that Behalf, it shall be sufficient, in the Absence of contrary Evidence, to prove that some Person other than the Owner or Occupant of such Place or Premises shall at the Time charged have been found in such Place or Premises drunk or drinking, or having had Drink supplied to him therein, and that such Place or Premises is or are by Repute kept as a Shebeen, or at the Time charged contained Drinking Utensils and Fittings usually found in Houses licensed for the Sale of Exciseable Liquors; and every Person found in any Shebeen drunk or drinking shall thereby be guilty of an Offence, and may at the Time be taken into Custody by any Officer of Police or Constable, and detained in any Police Office or Station House, or other convenient Place, and not later than in the course of the first lawful Day after he shall be so taken into Custody shall be brought before a Justice of the Peace or Magistrate, or if not so taken into Custody, or if he shall have been liberated on Bail or Pledge, may be summoned to appear before a Justice of the Peace or Magistrate, and on being convicted of such Offence shall forfeit and pay a Penalty not exceeding Ten Shillings, and in default of immediate Payment thereof shall be imprisoned for a Period not exceeding Ten Days.

XX. It shall be lawful for any Justice of the Peace of any County or District, or Magistrate of any Burgh, upon being satisfied by the personal Examination on Oath of a credible Witness that there is reasonable Ground for believing that Exciseable Liquors are trafficked in within any House or other Premises within such County or Burgh, as the Case may be, not licensed for the Sale thereof, or by any Person not having a Licence to sell Exciseable Liquors in or at such House or Premises, or that such Liquors are illegally kept for Sale or for the Purpose of being trafficked in at such House or Premises, to grant Warrant under his Hand authorizing any Chief Constable, Superintendent, Lieutenant, Inspector, or Sergeant of Police, with any Police Officers or Constables to enter

such House or Place at all Times and to search for Exciseable Liquors, and if the same be found in such House or Place exceeding One Gallon to seize such Exciseable Liquors, together with the Vessel or Vessels in which the same are contained; and such Warrant shall continue in force for One Month from the Date thereof, and shall be a sufficient Authority to the Chief Constable, Superintendent, Lieutenant, Inspector, or Sergeant of Police therein named, and their Assistants respectively, to enter into such House or Place and seize all such Liquors as aforesaid, and the Vessels containing the same, and to carry away and retain the same until disposed of as hereinafter provided: And the Person occupying or using the Premises where such Liquors shall be found as aforesaid shall thereby be guilty of an Offence, and on being convicted thereof shall forfeit and pay for the First Offence a Penalty not exceeding Five Pounds nor less than Two Pounds, and in default of immediate Payment shall be imprisoned, with or without Hard Labour, for any term not exceeding Thirty Days nor less than Ten Days, and for the Second and every subsequent Offence a Penalty not exceeding Ten Pounds nor less than Five Pounds, and in default of immediate Payment shall be imprisoned, with or without Hard Labour, for any Term not exceeding Sixty Days nor less than Thirty Days: And all such Exciseable Liquors and the Vessels containing the same so seized as aforesaid shall be forfeited and sold without further Warrant, and the Proceeds of such Sale shall be paid into the Rogue Money Funds of the County or Police Funds of the Burgh, and where there are no Police Funds, into the Corporation Funds of the Burgh, as the Case may be, in which the Premises in which such Liquors shall have been found are situate.

Penalties.

XXI. Every Person who shall be riotous, quarrelsome, or disorderly in any Shop, House, Premises, or Place licensed for the Sale of Spirits, Wine, Porter, Ale, Beer, or other Exciseable Liquors by Retail, whether to be consumed on the Premises or not, and shall refuse or neglect to quit such Shop, House, Premises, or Place upon being requested so to do by the Occupier or Manager thereof, or his Agent or Servant, or by any Constable, and every Person who shall refuse to quit such Shop, Premises, or Place at the Time of closing prescribed by this Act, on being required to do so as aforesaid, shall thereby be guilty of an Offence, and may be taken into Custody by any Officer of Police or Constable, and detained in any Police Office or Station House, or other convenient Place, and not later than in the course of the first lawful Day after he shall

Penalty on disorderly Persons refusing to quit licensed Houses on Request.

have been so taken into Custody shall be brought before a Sheriff or any One Justice of the Peace or Magistrate, or if not so taken into Custody, or if he shall have been liberated on Bail or Pledge, may be summoned to appear before a Sheriff or any One Justice of the Peace or Magistrate, and on being convicted of such Offence shall forfeit and pay a Penalty not exceeding Forty Shillings, and in default of immediate Payment shall be imprisoned for a Period not exceeding Twenty Days; and all Constables are hereby authorized and empowered to assist in expelling such riotous, quarrelsome, or disorderly Person refusing to quit the Premises at the Hour of closing from such Shops, Houses, Premises, and Places.

Persons
falsely re-
presenting
themselves
to be 'Tra-
vellers,
liable to a
Penalty.

XXII. Every Person who by any wilfully false Representation shall induce any Inn and Hotel Keeper, or the Servant of any Inn and Hotel Keeper, to sell or give out to him Exciseable Liquors on any *Sunday*, or to sell or give out to him Exciseable Liquors on any other Day during Hours when the Sale of Exciseable Liquors, excepting to Lodgers or Travellers, is prohibited by the Certificate of such Inn and Hotel Keeper, shall thereby be guilty of an Offence, and on being convicted thereof by any Sheriff or any One Justice of the Peace or Magistrate shall forfeit and pay a Penalty not exceeding Five Pounds, and in default of immediate Payment shall be imprisoned for a Period not exceeding Thirty Days.

Penalty to
Persons
found in-
toxicated
and in-
capable of
taking care
of them-
selves.

XXIII. Every Person found in a State of Intoxication, and incapable of taking care of himself, and not under the Care or Protection of some suitable Person, in any Street, Thoroughfare, or Public Place, shall be thereby guilty of an Offence, and may be taken into Custody by any Officer of Police or Constable, and detained in any Police Office or Station House, or other convenient Place, and not later than in the course of the First lawful Day after he shall have been so taken into Custody shall be brought before a Sheriff or any One Justice of the Peace or Magistrate, or if not so taken into Custody, or if he shall have been liberated on Bail or Pledge, may be summoned to appear before such a Sheriff, Justice of the Peace, or Magistrate, and on being convicted of such Offence shall forfeit and pay a Penalty of Five Shillings, and in default of immediate Payment shall be imprisoned for a Period not exceeding Twenty-four Hours.

Penalty for
harbouring
Constables
while on
Duty.

XXIV. Every Person licensed to sell Spirits, Wine, Porter, Ale, Beer, Cyder, Perry, or other Exciseable Liquors by Retail, whether to be drunk or consumed on the Premises or not, who knowingly harbours or entertains, or suffers to remain in the licensed Premises wherein he

carries on his Business, any Constable during any Part of the Time appointed for his being on Duty, unless for the Purpose of quelling any Disturbances or restoring Order, or otherwise in the Discharge of his Duty, shall be guilty of an Offence, and on being convicted thereof shall forfeit and pay a Penalty not exceeding Five Pounds, and in default of immediate Payment shall be imprisoned for a Period not exceeding Thirty Days.

XXV. Every Person who, after the passing of this Act, shall commit any Breach of Certificate, or who shall in any other Manner offend against either of the recited Acts or this Act, shall be prosecuted, and all Penalties, together with the Expenses of Prosecution and Conviction to be ascertained on Conviction, shall be recovered, unless by this Act otherwise specially directed or authorized, before the Sheriff or any Two or more Justices of the Peace of the County, or any Magistrate of the Burgh having Jurisdiction in the County or Burgh, as the Case may be, in which such Offender shall reside or such Offence shall have been committed, at the Instance of the Procurator Fiscal, or of such other Party as shall be specially appointed to prosecute such Class of Offences by the Justices of the Peace of the County in General Quarter Sessions assembled, or the Magistrates of the Burgh, as the Case may be, and which Appointment they are hereby specially authorized to make, and such Justices of the Peace in General Quarter Sessions, or Magistrates, as the Case may be, shall from Time to Time fix a reasonable Sum in name of Salary, or a reasonable Rate of Remuneration by Fees for Prosecutions, and all other Business under this Act, to be paid annually to such Procurator Fiscal or other Party appointed to prosecute as aforesaid; and which Salary, or the Amount of the Account of such Fees, as the same shall be taxed by the Clerk of the Peace of the County or District, or the Town Clerk of the Burgh, as the Case may be, together with all necessary and proper Outlays attending such Prosecutions, and also the Execution of the recited Acts and this Act, shall form a proper Charge against, and shall be paid annually out of the Rogue Money, or other Fund of the County out of which the Expenses of Criminal Prosecutions are in use to be paid, and in Burghs out of the Police Funds, or, where there are no Police Funds, out of the Corporation Funds of the Burgh, as the Case may be; and all Penalties and Expenses of Prosecutions and Convictions incurred under and imposed by the recited Acts and this Act shall, when recovered, if adjudged by any Sheriff, or Justice or Justices of the Peace, or

Procurator
Fiscal or
other
Party ap-
pointed
shall pro-
secute.

Applica-
tion of
Penalties
and Ex-
penses.

Magistrate of any Burgh or Place other than a Royal or Parliamentary Burgh, be wholly paid into the Rogue Money Fund of the County, and, if adjudged by any Magistrate or Police Judge of any Royal or Parliamentary Burgh, be wholly paid into the Police Funds, or, where there shall be no Police Funds, into the Corporation Funds of the Burgh in which such Penalties shall be imposed respectively.

Offences
how to be
tried.

XXVI. Every Offence committed against the recited Acts and this Act, or any of them, may, except where inconsistent with the Provisions and Conditions of this Act, be tried and determined in a summary Manner, without any written Pleadings, or Record, or Notes of Evidence, and before the Courts, and subject to the Provisions and Conditions provided in the said recited Acts or either of them; but in any Prosecution under the recited Acts and this Act, or any of them, the Complaint and Procedure following thereupon shall be in the Form, or as nearly as may be in the Form, provided by Schedule (D.) to this Act annexed; and it shall be lawful for the Sheriff, Justice or Justices, Magistrate or Magistrates, before whom such Prosecution is brought, to proceed in Absence of the Accused, upon Proof by the Oath of an Officer or Constable that the Accused has been duly summoned, or to issue his or their Warrant for apprehending and bringing the Accused before him or them, as the Case may be.

Power to
Justices or
Magistrates
to summon
Witnesses.

XXVII. It shall be lawful for any Justice of the Peace or Magistrate, in any Application for the granting or renewing of a Certificate under the Provisions of the recited Acts or this Act, or in dealing with any Objection to such Applications, or in any other Matter arising under the Provisions of the said recited Acts and this Act, or any of them, to grant Warrant to summon Witnesses and Havers on behalf of any Party interested; and it shall be lawful for the Justice or Justices of the Peace, Magistrate or Magistrates, before whom respectively any such Application, Objection, or Matter shall be depending, to examine all such Witnesses and Havers on Oath or solemn Affirmation, and to do and perform all Things necessary for the due and proper Hearing and Determination of the Cause or Matter: And any Person summoned as a Witness or as a Haver to appear before any Sheriff, Justice or Justices of the Peace, or Magistrate, touching any Matter arising out of the recited Acts or this Act, either on the Part of the Complainer or of the Person complained against, or of any Person interested in such Matter, who shall neglect or refuse to appear at the Time and Place for that Purpose appointed, and who shall not make such reasonable

Punish-
ment of
Witnesses
refusing to
attend or
prevaricat-
ing.

Excuse for such Neglect or Refusal as shall be admitted and allowed by such Sheriff, Justice or Justices, or Magistrate, may, when it shall be proved on Oath that he has been duly summoned at least Twenty-four Hours before the Meeting of the Diet of the Court, be apprehended and committed to Prison under the Warrant of the said Sheriff, Justice or Justices, or Magistrate, till he finds Security to appear and give Evidence; and any Person who shall so neglect or refuse to appear, or who appearing shall refuse to be examined on Oath or solemn Affirmation, shall thereby be guilty of an Offence, and on being convicted thereof shall forfeit and pay any Sum not exceeding Five Pounds, and in default of immediate Payment shall be imprisoned for a Period not exceeding Thirty Days; and if any Person who, under Examination on Oath or solemn Affirmation before any Sheriff, Justice or Justices, or Magistrate, in any Matter arising under the Provisions of the said recited Acts or this Act, shall prevaricate or wilfully conceal the Truth, it shall be lawful to such Sheriff, Justice or Justices, or Magistrate, in open Court, without any formal Complaint and in a summary Manner, to adjudge the Person so offending to be imprisoned for any Period not exceeding Sixty Days, or to forfeit and pay a Penalty not exceeding Five Pounds, and in default of immediate Payment to be imprisoned for a Period not exceeding Thirty Days, and the Sentence awarding such Punishment shall set forth shortly the Nature of the Offence.

XXVIII. It shall be lawful for the Justice or Justices of the Peace, Sheriff, or Magistrate before whom any Person may be brought for Trial for any Offence against the recited Acts and this Act, or any of them, to adjourn the hearing of the Complaint from Time to Time as may be deemed necessary, and also, if considered fit, to order the Detention of such Person in Prison, or in any Police Office or Station House, till the next Diet of Court, unless Bail is found, or a Pledge given to an Amount not exceeding the maximum Penalty concluded for.

Power to
adjourn
Trials and
detain
Offenders.

XXIX. Nothing contained in the recited Acts or this Act shall prevent anything done which may be an Offence under this Act, but which might have been prosecuted and punished as an Offence at Common Law, or under any other Act, if this Act had not passed, from being so prosecuted and punished as if this Act had not passed.

Offences
may be pro-
secuted at
Common
Law.

XXX. For the Purpose of trying Offences against the recited Acts and this Act, or any of them, except in Cases of Breach of Certificate and of imposing Penalties and declaring Forfeitures under the same, the Expressions

Offences
may be
tried in Po-
lice Courts.

Offences specified in Sects. 16, 19, 21, and 23 of this Act may be tried in Police Courts.

Warrants, etc., may be enforced in other Counties, etc.

Fees to Clerks not to be more than authorized by Schedule (E.) to this Act.

Power to Persons to appeal from Decisions of Sheriffs, etc., to Cir-

‘Magistrate of any Burgh,’ ‘Magistrate,’ and ‘Magistrates,’ shall include any Judge officiating in any Court for the Trial of Police Offences under the Provisions of any Local or General Police Act; and all such Offences committed within the Jurisdiction of any such Judge may be tried by and before him in any such Court, at the Instance of the Procurator Fiscal or other Party acting as Prosecutor under the Twenty-fifth Section of this Act: And every Person offending against the Sixteenth, Nineteenth, Twenty-first, and Twenty-third Sections of this Act may, if such Procurator Fiscal or Prosecutor shall choose so to do, be prosecuted before the Court, and in the Manner provided for the Trial of Police Offences by any General or Local Police Act in force in the County, District, or Burgh or Place where the Offender shall reside or the Offence shall have been committed, instead of as herein otherwise provided.

XXXI. All Warrants, Orders, Interlocutors, Judgments, Sentences, and Decrees of Sheriffs, Justices, and Magistrates, issued or pronounced under the Authority of the recited Acts or of this Act, may be executed and enforced in any County, District, Burgh, or Jurisdiction other than that in which they were so issued or pronounced, provided the Concurrence of the Sheriff or any One Justice of the Peace or Magistrate of such other County, District, Burgh, or Jurisdiction respectively be endorsed thereon, by any Constable or Officer of Court of the original or of any other County, District, Burgh, or Jurisdiction, and which Concurrence all Sheriffs, Justices of the Peace, and Magistrates are hereby authorized to grant.

XXXII. It shall not be lawful for the Clerk of the Peace, or Sheriff Clerk of any County or District, or the Town Clerk of any Burgh, to demand or receive any greater or additional Fee or Remuneration for anything done under the recited Acts or this Act than is authorized by the Schedule (E.) to this Act annexed, and the Town Clerks of those Parliamentary Burghs the Magistrates of which are not at present authorized to grant Certificates shall pay to the present Clerks of the Peace in the Counties within which such Burghs are situated One Half of the Fees received by such Town Clerks in respect of Applications for Certificates and Disposal of the same under this Act and the Acts herein recited, during the Time such Clerks of the Peace shall continue to hold Office.

XXXIII. It shall be competent to any Person conceiving himself aggrieved by any Warrant, Sentence, Order, Decree, Judgment, or Decision made or given by any Sheriff, Justice or Justices of the Peace, or Magistrate, in

any Cause, Prosecution, or Complaint raised under the Authority of the recited Acts or of this Act, for Breach of Certificate, or for trafficking in Spirits or other Exciseable Liquors without a Certificate, to bring the Case by Appeal before the next Circuit Court of Justiciary, or where there are no Circuit Courts before the High Court of Justiciary at *Edinburgh*, in the Manner, and by and under the Rules, Limitations, Conditions, and Restrictions which shall from Time to Time be prescribed by the said High Court of Justiciary: Provided always, that such Appeal shall be competent only when founded on the Ground of Corruption or Malice and Oppression on the Part of the Sheriff, Justice or Justices of the Peace, or Magistrate, as the Case may be, or on such Deviations in point of Form from the statutory Enactments as the Court shall think have prevented substantial Justice from having been done: Provided also, that such Appeal shall be heard and determined in open Court, and that it shall be competent to the Court to correct such Deviation in point of Form: Provided further, that Notice in Writing of such Appeal shall be given to the opposite Party, and to the Clerk of the Court pronouncing such Warrant, Sentence, Order, Decree, Judgment, or Decision, within Eight Days of the Date thereof, and that no Appeal shall be received or entertained unless the Party appealing shall, along with his Appeal, deposit with the Clerk of the Circuit Court or of the High Court of Justiciary, as the Case may be, a Certificate under the Hand of the Sheriff Clerk, Town Clerk, or Clerk of the Peace, or Clerk to the Magistrates, as the Case may be, that he has made Consignation in the Hands of such Clerk of the whole Sum and Expenses, if any, decerned for by the Warrant, Sentence, Order, Decree, Judgment, or Decision appealed from, and unless he shall have found sufficient Security for the whole Expenses which may be incurred and found due under the Appeal: Provided always, that nothing herein contained shall be held to exclude or interfere with the Right of Appeal to Quarter Sessions which at present exists, provided the Appellant shall forthwith deposit with the Clerk of the Peace the Amount of Penalty and Costs awarded against him.

omit Courts,
etc.

XXXIV. No Warrant, Sentence, Order, Decree, Judgment or Decision made or given by any Quarter Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate, in any Cause, Prosecution, or Complaint, or in any other Matter under the Authority of the said recited Acts or of this Act, shall be subject to Reduction, Advocation, Suspension, or Appeal, or any other Form of Review or Stay

Sentences
and Judg-
ments not
subject to
Review
except as
provided
by this Act.

of Execution, on any Ground or for any Reason whatever, other than by this Act provided.

Limitation
of Actions.

XXXV. Every Action or Prosecution against any Sheriff, Justice or Justices of the Peace, Magistrate, or Judge acting under any General or Local Police Act, or against any Sheriff Clerk, Clerk of the Peace, or Town Clerk, or any Procurator Fiscal, Superintendent, or other Officer of Police, or Constable, or other Person, on account of anything done in execution of the recited Acts and this Act, or any of them, shall be commenced within Two Months after the Cause of Action or Prosecution shall have arisen, and not afterwards.

Nothing to
repeal or
affect
recited Act,
except to
give Effect
to this Act.

XXXVI. Nothing herein contained shall be held to repeal or affect the Provisions of the recited Acts or either of them, except in so far only as shall be necessary to give Effect to the Provisions of this Act; and the Provisions and Enactments contained in the recited Acts, so far as not repealed, shall extend, and be construed, deemed, and taken to extend, to and form Part of this Act, in the same Manner and as fully and to all Intents and Purposes as if the said Provisions and Enactments were herein repeated and set forth at Length.

Interpreta-
tion of
Terms.

XXXVII. In this Act the following Words and Expressions shall have the several meanings hereby assigned to them, unless there be something in the Subject or Context repugnant to such Construction; that is to say,

The Expression 'Inn and Hotel' shall in Towns and the Suburbs thereof refer to a House containing at least Four Apartments set apart exclusively for the Sleeping Accommodation of Travellers; and in Rural Districts and populous Places not exceeding One thousand Inhabitants, according to the Census last before taken, to a House containing at least Two such Apartments:

The Word 'Shebeen' shall mean and include every House, Shop, Room, Premises, or Place in which Spirits, Wine, Porter, Ale, Beer, Cyder, Perry, or other Exciseable Liquors are trafficked in by Retail without a Certificate and Excise Licence in that Behalf:

The Expression 'trafficking' shall mean and include bartering, selling, dealing in, trading in, exposing or offering for Sale by Retail:

The Word 'hawking' shall mean and include trafficking in or about the Streets, Highways, or other Places, or in or from any Boat or other Vessel upon the Water:

The Word 'Certificate' shall mean any Certificate in Terms of this Act:

The Word 'Sheriff' shall mean and include Sheriff Substitute :

The Word 'Burgh' shall mean and include any Royal or Parliamentary Burgh, and the Boundaries of such Parliamentary Burghs shall for the Purposes of this and the recited Acts be the same as those within which the Magistrates of such Burghs have Jurisdiction in Matters of Police :

The Word 'Constable' shall mean and include Officers of Court, Chief Constable, Superintendent of Police, and every Grade of Constable or Police Officer, or any Person belonging to any Constabulary Force in any Part of *Scotland*, as also any Sheriff Officer or Justice of Peace Constable.

XXXVIII. This Act shall commence and take effect from and after the First Day of *September* next after the passing thereof. Com-
mencement
of Act.

XXXIX. This Act may be cited for all Purposes as 'The Public Houses Acts Amendment (*Scotland*) Act, 1862.' Short Title.

SCHEDULE (A.)

No. 1.

FORM OF CERTIFICATE FOR INNS AND HOTELS.

At a General Meeting for granting and renewing Certificates for the Sale of Exciseable Liquors held by Her Majesty's Justices of the Peace acting in and for the County [*or of the Magistrates of the Burgh, as the Case may be,*] of holden at
Day
 within the said County [*or Burgh*] on the of
 in the Year One thousand eight hundred and
 Her Majesty's Justices of the Peace acting in and
 for said County [*or the Magistrates of the said Burgh*] assembled at
 the said Meeting did authorize and empower *A. L.*, now dwelling
 at in
 , to keep an Inn and Hotel at the Parish of
 and County aforesaid [*or Burgh afore-*
said] for the Sale in the said House, but not elsewhere, of Victuals
 and of Spirits, Wine, Porter, Ale, Beer, Cyder, Perry, or other
 Exciseable Liquors, [*or of Victuals, and of Porter, Ale, Beer, Cyder,*
or Perry,] [*or of Victuals, Wine, Porter, Ale, Beer, Cyder, or*
Perry,] provided the said *A. L.* shall be licensed and empowered to
 sell such Liquors under the Authority and Permission of any Excise
 Licence to him or her in that Behalf granted, on the Terms and
 Conditions following; that is to say, that the said *A. L.* do not
 fraudulently adulterate the Bread or other Victuals or Liquors
 sold by him, or sell the same knowing them to have been fraudu-
 lently adulterated; and do not use in selling the same any Weight
 or Measure which is not of the legal Imperial Standard; and do not
 sell any Groceries or other uncooked Provisions in the said House

in that Behalf granted, on the Terms and Conditions following; that is to say, that the said A. L. do not fraudulently adulterate the Bread or other Victuals or Liquors sold by him, or sell the same knowing them to have been fraudulently adulterated; and do not use in selling the same any Weight or Measure which are not of the legal Imperial Standard; and do not sell any Groceries or other uncooked Provisions in the said House or Premises, to be consumed elsewhere; and do not knowingly permit any Breach of the Peace, or riotous or disorderly Conduct, within the said House or Premises; and do not permit or suffer Men or Women of notoriously bad Fame, or Girls or Boys, to assemble and meet therein; and do not sell or supply Exciseable Liquor to Girls or Boys apparently under Fourteen Years of Age, or to Persons who are in a State of Intoxication, and do not receive or take in, as the Price or for the Supply of Exciseable Liquors, any Wearing Apparel, Goods, or Chattels; and do not permit or suffer any unlawful Games therein; and do not keep open House, or permit or suffer any Drinking in any Part of the Premises belonging thereto, or sell or give out therefrom any Liquors, before Eight of the Clock in the Morning, or after Eleven of the Clock at Night, of any Day; and do not open his House for the Sale of any Liquors, or permit or suffer any Drinking therein, or on the Premises thereto belonging, or sell or give out the same, or any other Goods or Commodities, on Sunday; and, lastly, do not transgress or commit any Breach of the Conditions of any Permission to sell on a public or special Occasion within his own House or elsewhere; and do maintain good Order and Rule within his House and Premises. This Certificate to continue in force, upon the Terms and Conditions aforesaid, from the Day of
One thousand eight hundred and and no longer.

The above Certificate is made out according to the Deliverance in the Book or Register appointed to be kept in Terms of the Act of Parliament.

C. D., Clerk.

No. 3.

**FORM OF CERTIFICATE FOR DEALERS IN EXCISEABLE LIQUORS,
AND GROCERS AND PROVISION DEALERS TRADING IN EX-
CISEABLE LIQUORS.**

At a General Meeting for granting or renewing Certificates for the Sale of Exciseable Liquors held by her Majesty's Justices of the Peace acting in and for the County [*or of the Magistrates of the Burgh, as the case may be,*] of _____ holden at _____ within the said County [*or Burgh*] on the _____ day of _____ in the Year One thousand eight hundred and _____ Her Majesty's Justices of the Peace acting in and for the said County [*or the Magistrates of the said Burgh*] assembled at the _____

said Meeting did authorize and empower *A. L.*, now dwelling at _____, to keep Premises at _____ in the Parish _____ and County aforesaid [*or Burgh aforesaid*] for the Sale therein, but not elsewhere, of Spirits, Wine, Porter, Ale, Beer, Cyder, Perry, or other Exciseable Liquors, [*or of Porter, Ale, Beer, Cyder, or Perry,*] [*or of Wine, Porter, Ale, Beer, Cyder, or Perry,*] provided the said *A. L.* shall be licensed and empowered to sell such Liquors under the Authority and Permission of any Excise Licence to him in that Behalf granted, on the Terms and Conditions following; that is to say, that the said *A. L.* do not fraudulently adulterate the Liquors sold by him, or sell the same knowing them to have been fraudulently adulterated; and do not use in selling the same any Weight or Measure which 'is not of the legal Imperial Standard; and do not knowingly permit any Breach of the Peace, or riotous or disorderly Conduct, within the said Premises; and do not sell or supply Exciseable Liquors to Persons who are in a State of Intoxication, or to Girls or Boys apparently under Fourteen Years of Age, and do not traffic in or give any Spirits, Wine, or other Exciseable Liquors [*or Wine, Porter, Ale, Beer, Cyder, and Perry,*] [*or Porter, Ale, Beer, Cyder, and Perry,*] to be drunk or consumed on the said Premises, and do not receive or take in, as the Price or for the Supply of Exciseable Liquors, any Wearing Apparel, Goods, or Chattels; and do not traffic in or give out therefrom any Liquors before Eight of the Clock in the Morning, or after Eleven of the Clock at Night, of any Day; and do not open his Premises for Business, or for the Sale of any Liquors or any Goods or Commodities whatsoever, or sell or give out the same, on Sunday; and, lastly, do maintain good Order and Rule within his Premises. This Certificate to continue in force, upon the Terms and Conditions aforesaid, for One Year from the _____ Day of _____ One thousand eight hundred and _____

The above Certificate is made out according to the Deliverance in the Book or Register appointed to be kept in Terms of the Act of Parliament.

C. D., Clerk.

SCHEDULE (B.)

No. 1.

Unto the Honourable Her Majesty's Justices of the Peace for _____ [*or the Magistrates of the Burgh of _____*].

The Application of [*state full Name, Designation, and present Place of Abode of Applicant*].

Humbly Sheweth,

That the Applicant is desirous to obtain a Certificate for Licence for [an Inn and Hotel, *or* Public House, *or* a Dealer in Groceries and Provisions, *as the Case may be,*] at [*Place or Street, and Number*] in the Parish [*or Burgh*] of _____, and County _____

of _____, for the ensuing Year [*or Half Year, as the case may be*], in Terms of the 'Public Houses Acts Amendment (Scotland) Act, 1862,' and Acts therein recited, and refers to the Answers which are truly made to the subjoined Queries:

State whether it is a Renewal of a Certificate at present in Applicant's Name, or in that of another Party, or Renewal of a transferred Certificate, or a Certificate for a new House, that Applicant desires

Whether Applicant has attained Twenty-one Years of Age

Whether bred to the Trade; or if not, to what other Trade or Business

Whether Applicant carries on or intends to carry on or follow any other Trade or Occupation

Whether Applicant holds a Licence at present; and if so, state where the Premises are situated, and how long he has held the same

Whether Applicant has any Interest in any other Business in Premises at present licensed, or for which a Certificate is sought; and if so, where those Premises are severally situated

State the actual Rent of Premises, and the Proprietor's or Factor's Name and Designation

Signature of Applicant

Date

No. 2.

REPORT BY JUSTICE OR MAGISTRATE.

I, _____ One of Her Majesty's Justices of the Peace
for _____ [*or One of the Magistrates of the Burgh*
of _____ *as the Case may be*], hereby report that
I personally examined the Premises described in the foregoing Application, and that the same are of suitable Construction and Accommodation for the Purpose applied for, reserving to the Justices [*or Magistrates, as the Case may be,*] to determine whether it be meet and convenient to grant the Certificate applied for.

J. P. or Magistrate.

CERTIFICATE OF CHARACTER AND QUALIFICATION.

I,
for
of
Inquiry, that
cation, is [*here state Result of Inquiry touching Applicant's Character and Qualification*].

One of Her Majesty's Justices of the Peace
[or One of the Magistrates of the Burgh
as the case may be], certify, after careful
, designed in the foregoing Appli-
cation, is [*here state Result of Inquiry touching Applicant's Character and Qualification*].

J. P. or Magistrate.

SCHEDULE (C.)

LIST of APPLICATIONS for CERTIFICATES for the Sale of Excise-
able Liquors for the County [*or of the County*]
of *or Burgh of*, for new Premises,
by new Tenants or Occupants, and for Renewal of Transferred
Certificates.

| Name, Designation, and Residence of Applicant. | Number of Street of Burgh (or Place and Parish of County) of Premises. | Class of Certificate applied for. | Name and Address of Land- lord or Factor of Premises. |
|--|---|--------------------------------------|--|
| | <i>For New Premises.</i> | | |
| | <i>By new Tenants or Occupants.</i> | | |
| | <i>For Renewal of transferred Certificate.</i> | | |

SCHEDULE (D.)

No. 1.

COMPLAINT.

Unto the Honourable Her Majesty's Justices of the Peace for
the County of *[or Sheriff of the County*
of *or Magistrates of the Burgh of*
as the case may be].
Humbly complains A. B.
Procurator Fiscal of Court, [*or other Party appointed to
prosecute, as the Case may be,*] for the Public Interest:
That C. D. [*Designation*] [*in the Case of a Breach of Certificate
state here 'who holds a Certificate for the Sale of Exciseable Liquors
at [name the Place]'*] has been guilty of an Offence against the Laws

for the Regulation of Public Houses in Scotland, in so far as [*here state the Particulars of the Offence, specifying the Place and Time thereof, and in the Case of a Breach of Certificate, or trafficking without a Certificate, add, such Offence is the 'First,' 'Second,' 'Third,' or 'an Offence subsequent to the Third' Offence, as the case may be*].

May it therefore please your Honour [*or Lordship, as the case may be,*] to grant Warrant to summon the said to appear before you [*or to apprehend the said and bring him before you*] to answer to this Complaint, and to be dealt with in Terms of the Public Houses Acts Amendment (Scotland) Act, 1862, and the Acts therein recited, [*if the Certificate be declared to be forfeited, add, 'and further adjudge his Certificate to be forfeited, and null and void.'*]

A. B.

No. 2.

WARRANT TO SUMMON.

[*Place and Date.*]

The Justice [*or Sheriff or Magistrate*] grants warrant to Officers of Court to serve a Copy of this Complaint and of this Deliverance upon the therein named and designed *C. D.*, and to cite him to appear personally to answer thereto at [*here state the Place*] upon the Day of at of the Clock noon, with Certification, and also to cite Witnesses and Havers for both Parties for the same Time and Place,

G. H.,
J. P. or Sheriff or Magistrate.

No. 3.

WARRANT TO APPREHEND.

[*Place and Date.*]

The Justice [*or Sheriff or Magistrate*] grants Warrant to Officers of Court to search for and apprehend *C. D.*, named and designed in the foregoing Complaint, and, if necessary for that Purpose, to open any Shut or Lock-fast Places, and to bring him before any One or more, as may be competent, of Her Majesty's Justices of the Peace for the County of [*or the Sheriff of the County of or a Magistrate of the Burgh of*] to answer thereto at the [*name the Place or Court House*], and also to cite Witnesses and Havers for both Parties for all Diets in the Case.

G. H.,
J. P. or Sheriff or Magistrate.

No. 4.

CITATION.

To *C. D.* [*Designation.*]

Take notice, That you will have to appear personally at the Place and Time specified in the foregoing Warrant to answer to the Complaint to which this Notice is attached, with Certification.

This I do this

Day of

J. K.,
Officer of Court.

No. 5.

MINUTE OF COURT PROCEDURE.

(When Accused appears.)

At the Day of 18 , in the
Presence of of Her Majesty's Justices of the Peace for
the County of [or Sheriff or Magistrate], appeared
C. D. complained against; and the Complaint being read over to
him he answers that he is Guilty [or Not Guilty].

[*If Accused pleads Not Guilty.*]

The Witness [or Witnesses] after named was examined upon
Oath in support of the Complaint; viz.,

And the Witness [or Witnesses] after named was examined upon
Oath in Exculpation; viz.,

(When Accused is absent,)

At the Day of 18 , in
Presence of of Her Majesty's Justices of the Peace
for the County of [or Sheriff or
Magistrate], *C. D.* complained against having failed to appear, and
after Proof by the Oath of Officer of Court that such
Officer had duly summoned the said *C. D.* :

The Witness [or Witnesses] after named was examined upon
Oath in support of the Complaint; viz.

No. 6.

CONVICTION.

The Justices [or Justice or Sheriff or Magistrate] in respect of
the judicial Confession of the said *C. D.* [or of the Evidence adduced]
convict the said *C. D.* of the Offence charged [being a
Offence], and adjudge him to forfeit and pay to the Complainer the
Sum of of Penalty, [*if Expenses shall be awarded*]
with the Sum of of Expenses]; and in default of
[immediate] Payment thereof [*or if Time is allowed, state within*
Days from this Date,] adjudge him to be committed to
the Prison of for the Period of from the

Date of his Incarceration, unless said Sum [*or Sums*] shall be sooner paid, and grant Warrant to Officers of Court to apprehend him, and convey him to said Prison, and to the Keeper thereof to receive and detain him accordingly.

If against a Party holding a Certificate (if the Certificate be declared to be forfeited) add, 'and further adjudge his Certificate to be void and null from this Date.

A. B., J. P.,
or
G. H., J. P.,
M. N., J. P.,
or Sheriff or Magistrate.

SCHEDULE (E.)

The following FEES, and no others, to be payable to Clerks of the Peace, Sheriff Clerks, and Town Clerks acting under this Act or the Acts therein recited.

| | £ | s. | d. |
|---|---|----|----|
| Each printed Copy of Form of Application for Certificate | 0 | 0 | 6 |
| Lodging Application | 0 | 2 | 6 |
| Lodging Objection (under Section 11) | 0 | 2 | 6 |
| Inspection of Register or Applications, for each Hour or Part of an Hour | 0 | 1 | 0 |
| Warrant on Complaint | 0 | 2 | 0 |
| Each Witness examined in Trials | 0 | 1 | 0 |
| Conviction | 0 | 2 | 6 |
| Deciding Objections (under Section 11) | 0 | 1 | 0 |
| Lodging Appeal and finding Caution | 0 | 3 | 0 |
| Deciding Appeal | 0 | 2 | 6 |
| Extracts or certified Copies of any Proceedings, Warrants, or Conviction, per Sheet, written or printed, of 150 Words | 0 | 1 | 0 |

CAP. XXXVII.

An Act to remove Doubts concerning, and to amend the Law relating to, the private Estates of Her Majesty, Her Heirs and Successors.—[17th July 1862.]

‘WHEREAS by the Fifth Section of the Act passed in the First Year of the Reign of her Majesty Queen Anne, Chapter Seven, and intituled *An Act for the better Support of her Majesty's Household, and of the Honour and Dignity of the Crown*, it was enacted, that every Grant, Lease, or other Assurance which from and after the Twenty-fifth Day of March One thousand seven hundred and two should

<sup>1 Anne, c.
7, s. 5.</sup>

1 Anne, c.
7, s. 7.

1 G. 3, c. 1.

be made or granted by her said Majesty, her Heirs or Successors, Kings or Queens of this Realm, under the Great Seal of *England*, Exchequer Seal, Seals of the Duchy and County Palatine of *Lancaster* or any of them, or by Copy of Court Roll, or otherwise howsoever, of any Manors, Messuages, Lands, Tenements, Rents, Tithes, Woods, or other Hereditaments (Advowsons of Churches and Vicarages only excepted), within the Kingdom of *England*, Dominion of *Wales*, or Town of *Berwick-upon-Tweed*, or any of them, or any Part thereof, then belonging or thereafter to belong to her Majesty, her Heirs or Successors, or to any other Person or Persons in trust for her Majesty, her Heirs or Successors, in possession, reversion, remainder, use, or expectancy, whether the same were or should be in right of the Crown of *England* or as Part of the Principality of *Wales* or of the Duchy or County Palatine of *Lancaster*, or otherwise howsoever, to any Person or Persons, Body Politic or Corporate whatsoever, whereby any Estate or Interest whatsoever in Law or in Equity should or might pass from her Majesty, her Heirs or Successors, should be utterly void and of none Effect, unless such Grant, Lease, or Assurance should be made for some Term or Estate not exceeding Thirty-one Years or Three Lives, or for some Term of Years determinable on One, Two, or Three Lives, and unless such Grant, Lease, or Assurance respectively should be made to commence from the Date of making thereof, and if such Grant, Lease, or Assurance should be made to take effect in reversion or expectancy, that then the same, together with the Estate or Estates in possession of and in the Premises therein contained, should not exceed Three Lives or the Term of Thirty-one Years in the whole; and it was by Section Seven of the same Act enacted, that all Gifts, Grants, Alienations, Leases, and Assurances whatsoever to be had or made of any the said Manors, Messuages, Lands, Tenements, Rents, Tithes, or other Hereditaments, or of any of the Revenues therein mentioned, or Branches, or any Part thereof, contrary to the Provisions of the now reciting Act, or any of them, should be null and void without any Inquisition, Scire facias, or other Proceeding to determine or make void the same: And whereas by the Act passed in the First Year of the Reign of his Majesty King *George* the Third, Chapter One, and intituled *An Act for the Support of his Majesty's Household, and the Honour and Dignity of the Crown of Great Britain*, it was enacted, that the Revenue arising to his Majesty by Rents of Lands or for Fines of Leases of the same, or any of them (except the Revenue of the Duchy of *Cornwall*), should, from and immediately

after the Demise of his then late Majesty King *George* the Second, be during his Majesty's Life carried to and made Part of the General Aggregate Fund established by the Act of the First Year of the Reign of his late Majesty King *George* the First, and be during the said Term issued and applied, in the manner therein-after mentioned, to the Uses to which the said Fund was or should be made applicable: And whereas by the Act passed in the Thirty-fourth Year of the Reign of his Majesty King *George* the Third, Chapter Seventy-five, and intituled *An Act for the better Management of the Land Revenue of the Crown, and for the Sale of Fee-farm and other unimprovable Rents*, further Provisions were made touching Grants, Leases, and other Assurances which should be made or granted by his Majesty, his Heirs or Successors, under the Great Seal, or Seal of the Exchequer, or either of them, of any Manors, Messuages, Lands, Tenements, or Hereditaments, within the Kingdom of *England* and Dominion of *Wales*, or any of them, or any Part thereof then belonging or thereafter to belong to his Majesty, his Heirs or Successors, and being within the ordering and Survey of the Exchequer in *England*: And whereas by the Act passed in the Session of Parliament held in the Thirty-ninth and Fortieth Years of the Reign of his Majesty King *George* the Third, Chapter Eighty-eight, intituled *An Act concerning the Disposition of certain Real and Personal Property of his Majesty, his Heirs and Successors, and also of the Real and Personal Property of her Majesty and of the Queen Consort for the Time being*, it was enacted, that none of the Provisions or Restrictions contained in the said Acts of the First Year of her said Majesty Queen *Anne* and the First and Thirty-fourth Years of the Reign of his then Majesty, should extend to any Manors, Messuages, Lands, Tenements, or Hereditaments, of whatsoever Tenure the same might be, which had at any Time theretofore been purchased by his Majesty, or should at any Time thereafter be purchased by his Majesty, his Heirs or Successors, out of any Monies issued and applied for the Use of his or their Privy Purse, or with any other Monies not appropriated to any Public Service, or to any Manors, Messuages, Lands, Tenements, or other Hereditaments, of whatsoever Tenure the same might be, which had come to his Majesty, or should or might come to him or his Heirs or Successors, by the Gift or Devise of, or by Descent or otherwise from any of his, her, or their Ancestors, or any other Person or Persons not being Kings or Queens of this Realm: and it was thereby declared, that the Intent of that Enactment

84 G. 3,
c. 75.89 & 40 G.
3, c. 88.

4 G. 4, c.
18.

1 & 2 Vict.
c. 95, s. 4.

was that the same should operate to all Intents and Purposes as from the Birth of his then Majesty ; and by the same Act certain Powers of Disposition were given to his Majesty, his Heirs or Successors, over such Manors, Messuages, Lands, Tenements, and Hereditaments as are therein mentioned as aforesaid, and other Provisions were thereby enacted concerning the same : And whereas by the Act passed in the Fourth Year of the Reign of his Majesty King *George* the Fourth, Chapter Eighteen, intituled *An Act concerning the Disposition of certain Property of his Majesty, his Heirs and Successors*, it was enacted that all the Powers given to and vested in his Majesty, his Heirs and Successors, by the said Act of the Thirty-ninth and Fortieth *George* the Third, Chapter Eighty-eight, over the Manors, Messuages, Lands, Tenements, and Hereditaments purchased or to be purchased by him or them, or coming to him or them in manner in the same Act mentioned, and all other the Provisions of the same Act touching and concerning the same, should be and the same Powers and Provisions were by the now reciting Act extended to, and should be deemed, construed, and taken to extend and apply to all Manors, Messuages, Lands, Tenements, and Hereditaments, whether of Freehold or Copyhold or Customary or Leasehold Tenure, whereof his Majesty, or any Person or Persons in trust for him, at the Time of his Accession to the Crown of this Realm, or whereof his Heirs or Successors, or any Person or Persons in trust for them, at the Time of their respective Accessions to the Crown of this Realm, was, were, or should be seised and possessed, and which before such Accession he or they respectively might have legally granted, sold, given, or delivered : And whereas by the Fourth Section of the Act passed in the Session of Parliament held in the First and Second Years of the Reign of her present Majesty Queen *Victoria*, Chapter Ninety-five, intituled *An Act to provide for the Payment of certain Pensions*, after reciting the Seventh Section of the said Act, of the First Year of her Majesty Queen *Anne*, Chapter Seven, and that it was expedient to extend the said Provision to *Ireland* and *Scotland*, it was enacted, that the said Provision should be deemed and taken to extend to all Parts of the United Kingdom : And whereas it is doubtful whether the Provisions and Restrictions contained in the said Act of the First Year of her Majesty Queen *Anne* may not be held to have been by the said Act of the First and Second Years of her present Majesty Queen *Victoria*, Chapter Ninety-five, extended to the private Estates of her Majesty, her Heirs or Successors : And whereas it is expedient that such Doubts

should be removed, and that such Provisions should be made concerning the private Estates of her Majesty, her Heirs or Successors, as are herein-after contained:’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. That in the Construction of this Act the Expression ‘private Estates of her Majesty, her Heirs or Successors,’ shall mean (unless controlled or confined to a more limited Sense by express Words or the Context) any Manors, Messuages, Lands, Tenements, Leases, and Hereditaments, and other Real or Heritable Property and Estate, of whatsoever Tenure the same may be, whether situate or arising in *England, Scotland, or Ireland*, or in any other Part of her Majesty’s Dominions, which have at any Time heretofore been purchased or acquired by her Majesty, or shall at any Time hereafter be purchased or acquired by her Majesty, her Heirs or Successors, out of any Monies issued and applied for the Use of her or their Privy Purse, or with any other Monies not appropriated to any Public Service, and any Manors, Messuages, Lands, Tenements, Leases, and Hereditaments, and other Real or Heritable Property and Estate, of whatsoever Tenure the same may be, whether situate or arising in *England, Scotland, or Ireland*, or in any other Part of her Majesty’s Dominions, which have come to her Majesty, or shall or may come to her Majesty, or her Heirs or Successors, by the Gift or Devise or Disposition of, or by Descent, Inheritance, or Succession, or otherwise, from any of her or their Ancestors, or any other Person or Persons not being Kings or Queens of this Realm, and any Manors, Messuages, Lands, Tenements, Leases, and Hereditaments, and other Real or Heritable Property and Estate, of whatsoever Tenure the same may be, and whether situate or arising in *England, Scotland, or Ireland*, or in any other Part of her Majesty’s Dominions, which did or shall belong to her Majesty, or her heirs or Successors, or to any Person or Persons in trust for her or them, at the Time of her or their respective Accessions to the Crown of this Realm, and which before such Accession she or they respectively might have legally granted, sold, given, devised, disposed, or conveyed.

Interpreta-
tion of
Terms.

II. None of the Provisions or Restrictions contained in the said Acts of the First Year of her Majesty Queen *Anne* and the First and Thirty-fourth Years of his Majesty King *George* the Third, or in any other Act or Acts of Parliament relating to any Manors, Messuages, Lands,

Restric-
tions of 1
Anne, c. 7,
and 1 G. 3,
c. 1, and 84
G. 3, c. 75,
not to ex-

tend to the private Estates of the Sovereign.

Tenements, Leases, or Hereditaments, or other Real or Heritable Property or Estate vested in or belonging to her Majesty, her Heirs or Successors, in right of the Crown of this Realm, do or shall extend to the private Estates of her Majesty, her Heirs or Successors.

Leasehold Estates (other than in Scotland) to be vested in Trustees.

III. Such private Estates of her Majesty, her Heirs or Successors, situate or arising in any Part of her Majesty's Dominions, except *Scotland*, as are or shall be of Leasehold Tenure, shall be vested in some Trustee or Trustees for her Majesty, her Heirs and Successors respectively, from Time to Time to be respectively named or appointed by Instrument in Writing under the Sign Manual of her Majesty, her Heirs and Successors respectively, in the same Manner as if the Second Section of the said Act of the Thirty-ninth and Fortieth Years of his Majesty King *George* the Third, Chapter Eighty-eight, had extended to all such Estates.

Private Estates of the Sovereign in Scotland held under a Superior or in Lease to be vested in Trustees.

IV. Such private Estates of her Majesty, her Heirs or Successors, situate or arising in *Scotland*, as are or shall be held feudally directly under the Crown as Superior, may lawfully be held by her Majesty, her Heirs or Successors, of and under herself or themselves as Sovereign or Sovereigns of this Realm and Feudal Superiors, and the Dominium utile thereof shall not become *ipso facto* consolidated with the Dominium directum; and such private Estates of her Majesty, her Heirs or Successors, situate or arising in *Scotland*, as are or shall be held feudally under a Subject Superior, or as are or shall be held in Lease, shall be vested in some Trustee or Trustees for her Majesty, her Heirs and Successors respectively, from Time to Time to be respectively named or appointed by Instrument in Writing under the Sign Manual of her Majesty, her Heirs or Successors respectively, in the same Manner as if the Second Section of the said Act of the Thirty-ninth and Fortieth Years of his Majesty King *George* the Third, Chapter Eighty-eight, had extended to all such Estates.

As to Testamentary Disposition of the private Estates of the Sovereign other than in Scotland.

V. The private Estates of her Majesty, Her Heirs or Successors, situate or arising in any Part of her Majesty's Dominions (except *Scotland*), may be disposed of by her Majesty, her Heirs or Successors, in manner provided by the Fourth Section of the said Act of the Thirty-ninth and Fortieth Years of his Majesty King *George* the Third, Chapter Eighty-eight: Provided always that a Will or other Testamentary Disposition by her Majesty, her Heirs or Successors, of or concerning any such private Estates as aforesaid, shall not require Publication; and every such Will or Testamentary Disposition shall be valid and effectual, if signed by the Testator or Testatrix, or by

some other Person in his or her Presence, and by his or her Direction, in the Presence of Two Witnesses: Provided also, that every Will or other Testamentary Disposition by her Majesty, her Heirs or Successors, of any such private Estates as aforesaid, made under the Authority of this Act and of the said Act of the Thirty-ninth and Fortieth Years of his Majesty King *George* the Third, Chapter Eighty-eight, or either of them, and whether made before or after the passing of this Act, shall be construed with reference to the Property comprised in such Will or Testamentary Disposition, to speak and take effect as if it had been executed immediately before the Death of the Testator or Testatrix, unless a contrary Intention shall appear by the Will or other Testamentary Disposition.

VI. The private Estates of her Majesty, her Heirs or Successors, situate or arising in *Scotland*, may be disposed of by her Majesty, her Heirs or Successors, by Dispositions or Conveyance, either special or general, granted either *Mortis causâ* or *Inter vivos*; and all Dispositions, Conveyances, Deeds of Appointment, Commissions, Powers of Attorney, Wills, Deeds of Settlement, and other Deeds or Instruments to be made or granted by her Majesty, her Heirs or Successors, of or relating to the private Estates of her Majesty, her Heirs or Successors, situate or arising in *Scotland*, shall be valid and effectual, although not executed according to the Forms of the Law of *Scotland*, if the same shall be under the Sign Manual attested by Two or more Witnesses; and every such Disposition or Conveyance, if granted *Mortis causâ*, shall be valid and effectual, whether the same shall be under the Sign Manual as aforesaid or shall be signed by some other Person in the Presence of the Granter, and by his or her Direction in the Presence of Two or more Witnesses, who shall attest the same, although the same shall not be executed according to the Forms of the Law of *Scotland*.

As to Disposition of the private Estates of the Sovereign in *Scotland*.

VII. On the Demise of her Majesty, her Heirs or Successors, the private Estates of her Majesty, her Heirs or Successors, shall, subject and without Prejudice to any Disposition which shall have been made thereof under the Authority of the said Act of the Thirty-ninth and Fortieth Years of his Majesty King *George* the Third, Chapter Eighty-eight, or of this Act, descend or go in manner prescribed by, and (according to the Nature thereof) be subject to, the Provisions and Restrictions respectively referred to in the Fifth Section of the said Act of the Thirty-ninth and Fortieth Years of his Majesty King *George* the Third, Chapter Eighty-eight.

As to Descent of the private Estates of the Sovereign.

Private
Estates of
the Sove-
reign to be
subject to
Taxes.

VIII. The private Estates of her Majesty, her Heirs or Successors, shall be subject to all such Taxes, Rates, Duties, Assessments, and other Impositions, Parliamentary and Parochial, as the same would have been subject to if the same had been the Property of any Subject of this Realm; and all such Rates, Taxes, Assessments, and Impositions shall, so long as such private Estates shall be vested in her Majesty, her Heirs or Successors, or in any Person or Persons in trust for her Majesty, her Heirs or Successors as aforesaid, be ascertained, rated, assessed, or imposed thereon in the said Manner and Form in all respects as if the same Estates were the absolute and beneficial Estate of any of her Majesty's Subjects; but nevertheless such Rates, Taxes, Assessments, and Impositions shall be paid and payable in manner herein-after directed, and not otherwise.

Taxes to
be paid out
of the
Privy
Purse.

IX. So long as the private Estates of her Majesty, her Heirs or Successors, shall remain vested in her Majesty, her Heirs or Successors, or in any Trustee or Trustees for her Majesty, her Heirs or Successors as aforesaid, freed and discharged from the Provisions and Restrictions aforesaid, all Taxes, Rates, Duties, Assessments, Impositions, Rents, and other annual Payments, Fines, and other Outgoings, which shall from Time to Time be charged and chargeable upon or be or become due and payable in respect of all or any of such private Estates, shall be paid and discharged out of the Privy Purse of her Majesty, her Heirs or Successors, and Accounts thereof shall from Time to Time be returned to the Person or Persons for the Time being executing the Office of Privy Purse of her Majesty, her Heirs or Successors, or to his or their Deputy, who shall by and out of any Monies in his or their Hands applicable for the Use of her Majesty, her Heirs or Successors, pay and discharge the same.

Extension
of Trustee
Act, 1850,
to the pri-
vate Es-
tates (ex-
cept in
Scotland),
and to the
Personal
Estate of
the Sove-
reign.

X. The Trustee Act, 1850, shall extend to a Trustee or Trustees of the private Estates of her Majesty, her Heirs or Successors, situate or arising in any Part of her Majesty's Dominions except *Scotland*, and to any Trustee or Trustees of any Personal Estate of her Majesty, her Heirs or Successors, and any Petition or other Proceeding for obtaining the Benefit of that Act for or on behalf of her Majesty, her Heirs or Successors, shall be by and in the Name or Names of any Person or Persons authorized in that Behalf by her Majesty, her Heirs or Successors, by any Instrument in Writing under the Sign Manual.

Provision
as to legal
Proceed-
ings and

XI. All Suits and Actions, either Real or Personal, respecting the private Estates of her Majesty, her Heirs and Successors, in *Scotland*, and which may not be vested

in a Trustee or Trustees, may be sued in *Scotland*, on behalf of her Majesty, her Heirs and Successors, by and in the Name or Names of any Person or Persons to be from Time to Time for that Purpose appointed by her Majesty, her Heirs or Successors, by any Writing under the Sign Manual, every such Appointment to continue only during the Pleasure of her Majesty, her Heirs and Successors; and all Suits and Actions in *Scotland* respecting such private Estates at the Instance of other Parties may be sued and carried on by Summons or Process directed against such Person or Persons; and her Majesty, her Heirs or Successors, shall at all Times be entitled to require any Trustee or Trustees who may be vested in or possessed of any of the private Estates of her Majesty, her Heirs and Successors, in *Scotland*, to convey and dispo-
 ne the same to her Majesty, her Heirs or Successors, or to any new Trustee or Trustees to be named or appointed by her Majesty, her Heirs or Successors, by Writing under the Sign Manual; and in the event of the Failure, Delay, or Inability of any such Trustee or Trustees so to convey or dispo-
 ne the same, or in the event of the said Trustee or Trustees having died, it shall be competent for any Person or Persons authorized in that Behalf by her Majesty, her Heirs or Successors, by Writing under the Sign Manual, to apply by Petition to the Court of Session to declare that the Trust Conveyance subsists for the benefit of her Majesty, her heirs and Successors, and that her Majesty, her Heirs and Successors, are entitled to have the same transferred, and further to adjudge such private Estates in *Scotland* which shall be specified and described in the Petition from such Trustee or Trustees, or his or their Heirs or Heir, and to decern and declare the same to belong to her Majesty, her Heirs or Successors, or to such new Trustee or Trustees as may be so named and appointed, as the Case may be; and the Court of Session shall pronounce Decreet in Terms of the Prayer of such Petition, and such Decreet shall be held to be and shall have the Effect of a valid Conveyance and Disposition in due and usual Form of such private Estates as shall be specified and described in the Decreet in favour of her Majesty, her Heirs and Successors, or of such Trustee or Trustees, as the Case may be, and it shall be competent to register such Decreet in the General or Particular Register of Sasines in Terms of and to the Effect authorized by the 'Titles to Lands (*Scotland*) Act, 1858,' and the 'Titles to Lands (*Scotland*) Act, 1860.'

Trust
Estates in
Scotland.

XII. Provided, That nothing in this Act contained shall take away or interfere with any Right or Remedy by any

Saving of
the Rights

and Remedies of the Sovereign.

Law or Statute competent to her Majesty, her Heirs or Successors, in regard to the private Estates of her Majesty, her Heirs or Successors, or in regard to any Trusts of such Estates, or against any Trustee or Trustees, his or their Heirs, Executors, Administrators, and Assigns.

Short Title.

XIII. This Act may be cited for all Purposes as 'The Crown Private Estates Act, 1862.'

CAP. XXXVIII.

An Act to amend the Laws relating to the Sale of Spirits.—
[17th July 1862.]

Recital of Sect. 12 of 24 G. 2, c. 40, enacting that no Action should be brought to recover any Debt for Spirituous Liquors, unless contracted at One Time to the Amount of 20s.

'WHEREAS by the Twelfth Section of an Act passed in the Twenty-fourth Year of the Reign of King George the Second, Chapter Forty, intituled *An Act for granting to his Majesty an additional Duty upon Spirituous Liquors, and upon Licences for retailing the same; and for repealing the Act of the Twentieth Year of his present Majesty's Reign, intituled "An Act for granting a Duty to his Majesty to be paid by Distillers upon Licences to be taken out by them for retailing Spirituous Liquors,"* and for the more effectually restraining the retailing of distilled Spirituous Liquors; and for allowing a Drawback upon the Exportation of British-made Spirits; and that the Parish of St Mary-le-Bon, in the County of Middlesex, shall be under the Inspection of the Head Office of Excise, it is amongst other things enacted, that no Person or Persons whatsoever shall be entitled unto, or maintain any Cause, Action, or Suit for, or recover either in Law or Equity, any Sum or Sums of Money, Debt or Demands whatsoever for or on account of any Spirituous Liquors, unless such Debt shall have really been and *bonâ fide* contracted at One Time to the Amount of Twenty Shillings or upwards, nor shall any particular Article or Item in any Account or Demand for distilled Spirituous Liquors be allowed or maintained where the Liquors delivered at One Time, and mentioned in such Article or Item, shall not amount to the full Value of Twenty Shillings at the least: And whereas it is expedient that the said recited Enactment should be repealed so far as is herein-after mentioned: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That so much of the said Enactment as is herein-before recited shall be and ~~the same~~

Recited Enactment repealed.

is hereby repealed, so far only as relates to Spirituous Liquors sold to be consumed elsewhere than on the Premises where sold, and delivered at the Residence of the Purchaser thereof in Quantities not less at any One Time than a reputed Quart.

CAP. XLI.

An Act for amending 'The Rifle Volunteer Grounds Act, 1860.'—[17th July 1862.]

‘WHEREAS it is expedient to amend “The Rifle Volunteer Grounds Act, 1860,” by extending its Provisions to Corps of Volunteer Artillery:’ Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

23 & 24
Vict. c. 140.

I. The Expression ‘Corps of Volunteer Artillery,’ as herein used, shall mean any Corps of Volunteer Artillery of which her Majesty has accepted the Offer of Service, in pursuance of the several Acts of Parliament in that Behalf provided.

Definition
of ‘Corps
of Volun-
teer Artil-
lery.’

II. The Expression ‘Volunteer Grounds Acts’ shall mean ‘The Rifle Volunteer Grounds Act’ and this Act.

Definition
of ‘Volun-
teer
Grounds
Acts.’

III. Any Corps of Volunteer Artillery may purchase or acquire by Grant any Land for Artillery Practice, and for the Erection of Batteries, Targets, and other Accommodation for the Use of the Corps when practising with Artillery, in the same Manner and subject to the same Conditions in and subject to which a Rifle Volunteer Corps may purchase or acquire Land in pursuance of ‘The Rifle Volunteer Grounds Act, 1860,’ for the Purposes therein mentioned; and all the Provisions of ‘The Rifle Volunteer Grounds Act, 1860,’ shall extend to a Corps of Volunteer Artillery, in the same Manner as if throughout the said Act where a Rifle Volunteer Corps is named or referred to a Corps of Volunteer Artillery had also been named or referred to.

Provisions
of recited
Act extend-
ed to Vol-
unteer
Corps of
Artillery.

IV. Where previously to the passing of this Act any Land has become vested in any Person or Persons, on trust for or on behalf of any Corps of Volunteer Artillery, such Land shall on the passing of this Act pass to and vest in the Commanding Officer for the Time being of such Corps, and his Successors in Office, for all the Estate and Interest to which the Corps is entitled in such Land, in the same

Lands, etc.,
held on
trust for
any Corps,
to pass and
vest in Offi-
cer in Com-
mand for
Time be-
ing.

Manner as if such Land had been acquired in pursuance of the Provisions of the Volunteer Grounds Acts, without Prejudice, nevertheless, to any Reservation of Rent or other Right, or to the Recovery of such Rents or the Enforcement of such Rights by any Person or Persons by whom the same might have been recovered or enforced if this Act had not passed.

Penalty on wilful Injuries to Butts and Targets.

V. If any Person wilfully commits any Damage or Injury to the Butts or Targets belonging to or lawfully used by any Corps of Volunteers, or, without the Leave of the Commanding Officer of such Corps, searches for Bullets in or otherwise disturbs the Soil forming such Butts or Targets, he shall, upon summary Conviction, incur for each Offence a Penalty not exceeding Five Pounds.

CAP. LIV.

An Act to make further Provision respecting Lunacy in Scotland.—[29th July 1862.]

20 & 21
Vict. c. 71.

21 & 22
Vict. c. 89.

‘WHEREAS an Act was passed in the Twentieth and Twenty-first Year of the Reign of her present Majesty, intituled *An Act for the Regulation of the Care and Treatment of Lunatics, and for the Provision, Maintenance, and Regulation of Lunatic Asylums in Scotland*; and another Act was passed in the Twenty-first and Twenty-second Year of the Reign of her present Majesty, intituled *An Act to amend an Act of the last Session, for the Regulation of the Care and Treatment of Lunatics, and for the Provision, Maintenance and Regulation of Lunatic Asylums, in Scotland*: And whereas it is expedient to continue the General Board of Commissioners in Lunacy constituted by first-recited Act, and to amend certain of the Provisions of the said Acts:’ Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Interpretation of Terms.

I. The following Words and Expressions when used in this Act shall have the Meanings hereby assigned to them:

‘Board’ shall mean the General Board of Commissioners in Lunacy for *Scotland* constituted by the said first-recited Act:

‘Secretary’ shall mean the Secretary of the Board for the Time being:

‘Lunatic Wards of a Poorhouse’ shall mean those Wards

or Parts of a Poorhouse sanctioned by the Board for the Reception and the Detention of Pauper Lunatics :

‘ Medical Person ’ shall mean any Person registered as a Practitioner in Medicine or Surgery, pursuant to the Act Twenty-first and Twenty-second *Victoria*, Chapter Ninety :

‘ Lunatic,’ when used in this and the recited Act, shall mean and include every Person certified by Two Medical Persons to be a Lunatic, an insane Person, an Idiot, or a Person of unsound Mind :

‘ Pauper Lunatic ’ shall mean and include any Lunatic towards the Expense of whose Maintenance any Allowance is given or made by any Parochial Board :

‘ Sheriff ’ shall include Sheriffs Substitute :

‘ Superintendent ’ shall mean the Person or Persons having the Management or Charge of any Asylum, and shall include the Proprietor and all Persons having any pecuniary Interest therein, or in the Profits to be derived therefrom, and also the Governor of any Poorhouse in which Pauper Lunatics are kept, and the Proprietor or any Person or Persons having a pecuniary Interest in any other Licensed House for the Reception of Lunatics.

II. The Provisions of the said Act in regard to the Appointment of Deputy Commissioners shall be and are hereby continued until the First Day of *August* One thousand eight hundred and sixty-four.

Provisions
as to Ap-
pointment
of Deputy
Commis-
sioners
continued.

III. It shall be lawful for the Board to license Lunatic Wards of Poorhouses for the Reception and Detention, on the Order of the Sheriff, of such Pauper Lunatics only who are not dangerous, and do not require curative Treatment, subject to such Rules and Conditions as the Board may prescribe ; and the Board may also, if they shall be satisfied that good Reasons exist therefor, continue all Licences that have been already granted to Lunatic Wards of Poorhouses.

Board may
license
Lunatic
Wards of
Poor-
houses.

IV. It shall be lawful for the Board to sanction the Reception of Pauper Lunatics into Lunatic Wards of Poorhouses without the Order of the Sheriff, according to Forms and subject to Regulations approved of by the Board, and at any Time to withdraw such Sanction ; and any Governor or Keeper of a Poorhouse who shall receive any such Lunatic without an Order by the Sheriff or Sanction of the Board, or detain any such Lunatic for more than Seven Days after the Withdrawal of such

Board may
sanction
the Recep-
tion of
Pauper
Lunatics in
Poor-
houses.

Sanction, shall be liable in a Penalty not exceeding Ten Pounds.

Board may grant Special Licences for Reception in Houses of not more than Four Lunatics.

V. It shall be lawful for the Board to grant Special Licences to Occupiers of Houses, for the Reception and Detention therein of Lunatics, not exceeding Four in Number, subject to such Rules and Regulations as the Board may appoint, and to exempt the Holders of such Special Licences from the Payment of any Fee, or of any Sum whatever in respect thereof; and, except in so far as expressly exempted by the Board, the Holders of such Licences shall be subject to the whole Provisions applicable to the Keepers or Superintendents of Private Asylums in the recited Acts and this Act contained; and the Board, in the Case of a Lunatic who is a Pauper, on the Application of the Inspector of the Poor of the Parish liable at the Time for the Maintenance or interim Maintenance of such Lunatic, or in any other Case, on the Application of any one legally entitled to make the same, accompanied by Medical Certificates in the Forms herein-after prescribed, may sanction the Reception and Detention of such Lunatic in any House so specially licensed: Provided that no Lunatic shall be received into any such House without the Sanction of the Board, granted according to the Forms and Regulations approved of by them; and any Person receiving any Lunatic into any House specially licensed as aforesaid, or being concerned in the Disposal of such Lunatic without the Sanction of the Board, shall be liable to a Penalty not exceeding Ten Pounds.

Provision for allowing Persons to enter Asylum voluntarily.

VI. If any Person desirous of being received into any Public, Private, or District Asylum, or into any House specially licensed for the Reception of Lunatics as aforesaid, shall make a Declaration to that Effect before the Sheriff of the County in which such Asylum or House is situate, and shall produce to such Sheriff a Certificate by a Medical Person that his Reception into and Treatment in such Asylum or House would be beneficial to his Case, and a written Consent by the Superintendent of such Asylum or House to receive him, it shall be lawful for such Sheriff to grant an Order for his Reception into such Asylum or House, which shall be a sufficient Warrant to such Superintendent to receive him accordingly, and to subject him to the Rules and Regulations of such Asylum or House: Provided always, that the said Superintendent shall, within Three clear Days after such Reception, and subject to a Penalty of Fifty Pounds in case of Default, transmit to the Board, and also to the said Sheriff, a Statement of all the Circumstances connected with such Application and Reception, together with his Opinion of the

State of Mind of the Person so received, and of the Expediency or otherwise of his being detained in such Asylum or House, and shall make a similar Report once every Month thereafter, so long as such Person shall remain in such Asylum or House, under a similar Penalty; which Penalties may be sued for and recovered by the Secretary to the Board, and applied as Fees received for Licences are directed to be applied by the first-recited Act; provided that it shall always be competent to such Person to depart from such Asylum or House, unless the Superintendent thereof shall certify to the said Sheriff that he considers such Person to be in a state of Mind dangerous to himself or others; and it shall be lawful for the Board or for the said Sheriff respectively, if they or he shall see Cause, to order the immediate Discharge of such Person from the said Asylum or House, or to make such other Order as to them or him may in the Circumstances seem proper.

VII. It shall be lawful for the Board to grant Licences to any charitable Institution established for the Care and Training of imbecile Children, and supported in whole or in part by private Subscription, without exacting any Licence Fee therefor, and such Licence may be in Name of the Superintendent of such Institution for the Time being.

Board may
license
charitable
Institu-
tions for
imbecile
Children
without
Fee.

VIII. With the Sanction of the Board, Agreements and Arrangements may be made for the Reception and Detention of all or any of the Pauper Lunatics of any District, County, or Parish in any Public, Private, District, or Parochial Asylum or Hospital within or beyond the Limits of such District, County, or Parish.

Care of
Pauper
Lunatics.

IX. Subject to the Provisions of the said first-recited Act and this Act, the Board, on a full Consideration of the Circumstances, may determine from Time to Time whether the Accommodation for any District is adequate, or what Addition ought to be made thereto, or whether a new District Asylum ought to be erected, and may in the event of a District Board failing to take such Steps as the Board may consider requisite toward providing Accommodation for the District, or contracting with an existing Asylum to such an Extent and in such a Way as the Board may consider necessary, represent such Failure to One of her Majesty's Principal Secretaries of State, who may thereupon communicate such Representation to the District Board, and after considering any Answer which may be made thereto, within such Time as he may appoint, such Secretary of State may authorize the Board to apply to the Court of Session in either Division, or during Vacation to the Lord Ordinary on the Bills, by summary Petition in

Secretary
of State
may autho-
rize the
Board to
apply to
Court of
Session.

common Form, and the Court or Lord Ordinary shall, unless sufficient Cause be shown to the contrary, on advising such Petition, appoint a Person at whose Sight and Instance the whole Powers and Duties of the District Board relative to the providing of such Accommodation shall be performed, at the Expense of the District Board.

Counties or
Parishes
providing
Asylum
Accommo-
dation to
be relieved
from As-
sessments.

X. Any County or Parish which has, prior to the Date of the recited Act, provided Accommodation for its lunatic Paupers in whole or in part, to the Satisfaction of the Board, or which shall be entitled to such Accommodation in any existing Asylum, shall have such Relief, partial or total, from Assessments for building, furnishing, or maintaining an Asylum for the District within which such County or Parish is situate as the Board may consider reasonable.

Additional
Grounds to
District
Asylums.

XI. In the Case of any District Asylum where it shall appear to the Board, or to the District Board (the Consent of the Board being previously obtained), that it is desirable to acquire additional Ground for the Use of such Asylum, it shall be lawful for the District Board to acquire such additional Ground from the Proprietor or Proprietors of the Land immediately adjoining; and in the event of the Parties failing to agree as to the Price to be paid for such additional Ground, the same shall be settled and determined in the Manner prescribed by 'The Lands Clauses Consolidation (Scotland) Act, 1845,' with respect to the Purchase and Value of Land otherwise than by Agreement: Provided always, that the Land so to be taken does not form Part of any Garden or Pleasure Ground, and shall not exceed Five Acres in Extent: Provided also, that if the Ground from which the same is taken forms Part of a Property not exceeding Twenty Acres in Extent, it shall be lawful for the Proprietor of the same to require that the Remainder of such Property shall also be acquired in the same Manner by such District Board.

Where
there is no
Asylum,
District
Board may
dissolve it-
self.

XII. If in any District there shall be no District Asylum, it shall be lawful for the District Board of such District, with the Sanction of the Board, to dissolve itself, and on the Requisition and Order of the Board such District Board may again at any Time be revived, and where there is no District Asylum the Expenses incurred by the District Board may be paid by the Prison Board out of the Prison Assessments, or where any Ground has been acquired for the Erection of a District Asylum and now found not to be requisite, either in whole or in part, it shall be lawful for the District Board to sell and dispose of the same or of any Part thereof, and to repay the Proceeds, after Payment of all Expenses and Liabilities incurred by the Board, to the

Commissioners of Supply for the County or Magistrates of the Burgh, as the case may be.

XIII. Notwithstanding anything in the said recited Acts to the contrary implied or expressed with respect to the borrowing of Money for the Purposes of said Acts, it shall be lawful for any District Board to make Provision for Repayment of Monies so borrowed, and of the Interest thereof, by annual Instalments of a fixed and uniform Amount, so long as any Part of the Principal Sums so borrowed remains unpaid.

District Boards may make Provision for Payment of Interest on borrowed Monies by fixed Instalments.

XIV. The Thirty-fourth Section of the first-recited Act is hereby repealed; and in lieu thereof, subject to the following Provisions, the Sheriff of any County in *Scotland* may grant an Order for the Reception into and Detention in any Asylum, Lunatic Ward of a Poorhouse, or House as before provided, of any Lunatic, if such Lunatic be resident or be found within such County, or if the Asylum, Lunatic Ward, or House mentioned in such Order be situate within such County; but no such Order shall be granted unless upon a Petition subscribed by the Party applying for the same, accompanied by a Statement of Particulars in the Form of Schedule (C.) to the first-recited Act annexed, and setting forth the Degree of Relationship or other Capacity in which the Petitioner stands to such Lunatic, and also accompanied by Certificates in the Form of Schedule (D.) to the first-recited Act annexed, bearing Date within Fourteen clear Days next preceding the Date of the Petition, under the Hands of Two Medical Persons, having no immediate or pecuniary Interest in the Asylum in which the Lunatic shall be placed, but One of whom may notwithstanding be the Medical Superintendent or Consulting or Assistant Physician of such Asylum, not being a Private Asylum; and such Orders shall be in the Form of Schedule (E.) to the first-recited Act annexed; and no Superintendent of any such Public, Private, or District Asylum or House shall receive or detain any Person as a Lunatic therein, unless there shall be produced to and left with such Superintendent such Order by the Sheriff, dated within Fourteen clear Days prior to the Reception of such Lunatic, or if such Order be granted by the Sheriff of *Orkney* and *Shetland*, within Twenty-one clear Days prior thereto; provided that the Superintendent of any Public, Private, or District Asylum may receive and detain therein, for any Period not exceeding Three Days, and without any Order by the Sheriff, any Person as a Lunatic, whose Case is duly certified to be One of Emergency by One Medical Person qualified as aforesaid.

Lunatics to be admitted by Order of the Sheriff and on Medical Certificate.

Sheriff may
commit
dangerous
Lunatics.

XV. The Eighty-fifth Section of the first-recited Act is hereby repealed, and in lieu thereof, when any Lunatic shall have been apprehended, charged with Assault or other Offence inferring Danger to the Lieges, or when any Lunatic shall be found in a State threatening Danger to the Lieges, or in a State offensive to public Decency, it shall be lawful for the Sheriff of the County in which such Lunatic may have been apprehended or found, upon Application by the Procurator Fiscal or Inspector of the Poor, or other Person, accompanied by a Certificate from a Medical Person, bearing that the Lunatic is in a State threatening such Danger, or in a State offensive or threatening to be offensive to public Decency, forthwith to commit such Lunatic to some Place of safe Custody; and the Sheriff shall thereupon direct Notice to be given, in some Newspaper circulated in the County within which such Lunatic was apprehended or found, of such Commitment, and that it is intended to inquire into the Condition of such Lunatic on an early Day to be named, and shall also direct Notice of the Application to be given to the Inspector of Poor of the Parish within which the Lunatic has been apprehended or found (where the Application is not presented by the Inspector of such Parish), and such further Notice as he shall think fit; and if the Inspector of the Parish does not within Twenty-four Hours undertake, to the Satisfaction of the Sheriff, to make due Arrangements for the safe Custody of such Lunatic, the Sheriff shall accordingly proceed to take Evidence of the Condition of such Lunatic, and upon being satisfied that he is a Lunatic, and in a State threatening Danger to the Lieges, or offensive to public Decency, he shall commit the Lunatic to any Asylum; and an Order authorizing the Superintendent of the Asylum to which the Lunatic may be committed to receive the Lunatic, and authorizing the Transmission of the Lunatic to such Asylum, shall be granted by the Sheriff in respect of every such Commitment; and such Lunatic shall be detained in such Asylum until cured, or until Caution shall be found for his safe Custody, in which last case it shall be lawful for the Sheriff, upon Application to that Effect, and on being satisfied as to such Caution, and the Safety and Propriety of such Custody, to authorize the Delivery of the Lunatic to the Person so finding Security; and the Sheriff, at the Time of granting Warrant to commit such Lunatic to an Asylum, or thereafter in Proceedings following on the said Application, shall pronounce a Judgment finding the Amount of the Expenses connected with the said Application, Inquiry, and Procedure, as the same shall be taxed, and shall

grant Decree for such Expenses against the Parish within which the Lunatic shall have been apprehended or found at large, and in favour of the Procurator Fiscal, or other Person (except the Inspector of the Poor) at whose Instance such Application shall have been made and such Inquiry and Procedure conducted, and shall also grant Decree against such Parish and in favour of the Procurator Fiscal or other such Person (except the Inspector of Poor), or in favour of the Superintendent or Keeper of the Asylum to which the Lunatic shall have been committed, for such Sum as may be necessary for the Maintenance of such Lunatic; and every such Decree shall be final and conclusive, and not subject to Review or Reduction in any Way or by any Process whatsoever; but the Parish so decerned against and paying such Expenses and Cost of Maintenance shall have Relief and Recourse therefor against the Lunatic and his Estate, and any of his Relatives legally liable for his Maintenance, and also against the Parish of Settlement of such Lunatic in the event of the Parish in which the Lunatic was apprehended or found at large not being the Parish of Settlement as accords of Law.

XVI. The Board may, on the Application of the Person at whose Instance any Lunatic is detained, or in the Absence of such Person on the Application of the nearest known Relative of such Lunatic, and in the case of a Pauper Lunatic on the Application of the Inspector of Poor of the Parish by which the Expense of the Maintenance of the Lunatic is defrayed, authorize the Removal or Transfer of any such Lunatic from any Asylum or House in which he is detained to any other Asylum or House legally set apart for the Reception and Detention of such Persons, and without any Order of the Sheriff; and also on the like application respectively may grant Authority for the Liberation on Trial or Probation of any Lunatic from any such Asylum or House for such Time and under such Regulations as the Board may consider necessary or proper; and during such Period of Probation or Trial the Warrant and Certificates on which the Detention of such Lunatic proceeded shall, in the event of his requiring to be again received into any such Asylum or House, be sufficient for his Reception and Detention therein without a new Warrant and Certificate; and the Superintendent of any such Asylum or House shall be bound to receive any such Lunatic into his Establishment without any Order from the Sheriff, but shall, in all other respects in so far as not inconsistent with this Act, be bound to comply with the whole other Provisions relating to the Reception, Deten-

On Application of Person at whose Instance a Lunatic is detained, Board may authorize his Removal or Liberation on Probation without an Order of the Sheriff.

tion, and Liberation of Lunatics in the recited Acts and this Act contained, under the Penalties therein and herein provided.

Superintendent to give Intimation of Recovery of a Lunatic.

XVII. When it shall appear to the Superintendent of any Asylum or House that any Lunatic detained therein has so far recovered that he may be safely liberated without Risk or Injury to the Public or the Lunatic, such Superintendent shall grant a Certificate to that effect, or procure one from the ordinary Medical Attendant of such Asylum or House, and shall transmit a Copy thereof to the Person at whose Instance such Lunatic is detained, or in the Absence of such Person to the nearest known Relative of the Lunatic, and in the Case of a Pauper Lunatic to the Person or Parish by whom the Expense of the Maintenance of the Lunatic is defrayed; and on the Failure, within Fourteen Days from the Despatch of such Copy Certificate, of the Person to whom the same was transmitted to take Steps for the Liberation of such recovered Lunatic, such Superintendent shall intimate the Facts to the Board, who may direct such Inquiry into the Circumstances as they deem necessary, and if satisfied that the Lunatic has recovered, or that he may be safely liberated without Risk or Injury to the Public or himself, the Board may order his Discharge forthwith.

If Parochial Board neglect to provide for Removal of a Pauper Lunatic, Board may take necessary Measures.

XVIII. If any Parochial Board, after Intimation shall have been made to them in Terms of Section One hundred and twelve of the first-recited Act, and after Requisition by the Board, shall refuse or neglect, for Twenty-one Days after such Requisition, to provide for the Removal of a Pauper Lunatic to an Asylum, House, or Lunatic Ward of a Poorhouse, the Board may take such Measures as are necessary for the Removal of such Lunatic to an Asylum, House, or Lunatic Ward of a Poorhouse, and the whole Expense of such Removal, and all subsequent Expenses incurred by the Board for Maintenance and otherwise in respect of such Lunatic, shall be recoverable by the Board, by ordinary Process, from the Parochial Board refusing or neglecting to remove such Pauper Lunatic as aforesaid; but subject to any Right of Relief which such Parochial Board may legally have against the Parish ultimately liable for the Maintenance and Support of such Lunatic.

Insane Prisoners may, on Expiry of Sentence, be detained in General Prison.

XIX. If at any Time within Sixty Days of the Expiration of the Sentence of any Convict or other Prisoner confined in the General Prison at *Perth*, it is certified, on Soul and Conscience, by Two or more Medical Persons, that they have personally visited and carefully examined the Prisoner within the said Sixty Days, and that he is in their Opinion insane, and that his Insanity is of a Kind which

renders it advisable that he should be detained in the Lunatic Department of the said General Prison rather than in a Lunatic Asylum, it shall be lawful for One of her Majesty's Principal Secretaries of State, by a Writing under his Hand, to authorize such Prisoner to be detained in the said General Prison after the Expiration of his Sentence, and such Prisoner may thereupon be detained accordingly; provided that it shall at any Time thereafter be lawful for her Majesty to give such Order for the safe Custody of such Prisoner during her Majesty's Pleasure in such Place and in such Manner as to her Majesty shall seem fit.

XX. If any Person, having been charged under an Indictment or Criminal Libel, shall be ordered by the Court, under the Provisions of the first-recited Act, to be kept in strict Custody until her Majesty's Pleasure shall be known, such Order, whether the General Prison at *Perth* be mentioned therein or not, or whether the Name of any other Prison or Place be mentioned therein or not, shall be deemed, and is hereby declared to be an Order which may be carried into effect in the said General Prison (unless such Order expressly directs that such Person shall not be removed to the said General Prison); and the Person to whom such Order applies may (excepting in the Case above provided) be removed thereto, under the Provisions for the Removal of Prisoners contained in the 'Prisons (Scotland) Administration Act, 1860,' and shall be detained in such Prison until her Majesty's Pleasure be known; and it shall thereafter be lawful for her Majesty to give such Order for the safe Custody of such Person during her Majesty's Pleasure, in such Place and in such Manner as to her Majesty shall seem fit; provided that within Eight Days after the Reception of such Person within the said General Prison, Intimation of such Reception, under the Hand of the Governor of the General Prison, shall be transmitted to One of her Majesty's Principal Secretaries of State, and also to the Secretary of the Board.

Orders may be carried out in General Prison.

XXI. When any such Order shall be pronounced, the Clerk of Court shall within Eight Days of the Date thereof send Intimation of such Order, as nearly as may be, in the Terms provided in Section Fifty-nine of the said Prisons Administration Act, to the Managers appointed under the said Act.

Orders to be intimated to Managers of Prisons.

XXII. If it shall be certified on Soul and Conscience by Two Medical Persons that they have personally visited and carefully examined a Prisoner confined under Sentence in a Local Prison, in Terms of the said Prisons Administration Act, and that such Prisoner is insane, the Sentence,

Sentences for less than Nine Months may be carried out in General Prison.

although for a shorter Period than Nine Months, shall be deemed to be a Sentence which may be carried into effect in the said General Prison, and such Prisoner may be removed thereto, in Terms of the Provisions of the said Prisons Administration Act for the Removal of Prisoners.

Insane Prisoners may be removed to an Asylum.

XXIII. If, within Fourteen Days of the Period when a Prisoner in the said General Prison would fall to be liberated by Expiry of Sentence or otherwise, it shall be certified on Soul and Conscience by Two Medical Persons that they have personally visited and carefully examined such Prisoner, and that he is insane, such Prisoner may be removed back to the Local Prison to which he had been committed until liberated in due Course of Law, and such Removal may be carried out in Terms of the Provisions of the said Prisons Administration Act for the Removal of Prisoners; and if Arrangements shall have been completed for the Reception of such Prisoner within a Lunatic Asylum in any Part of *Scotland* in which he can be lawfully received and detained, he may be removed to such Asylum as if the same were such Local Prison, in Terms of such Provisions for the Removal of Prisoners.

Secretary of State may give Orders for Custody of Persons, etc.

XXIV. The Provisions of the first-recited Act and of this Act authorizing her Majesty to give Orders for the safe Custody of any Person during her Pleasure, may be carried into effect by a Writing under the Hand of One of her Principal Secretaries of State, and such Writing shall be binding on all Persons concerned.

Certain Provisions of recited Acts repealed.

General Board continued.

XXV. Sections Twenty-two and Twenty-three of the first-recited Act, and such other of the Provisions of the recited Acts as are inconsistent with this Act, are hereby repealed; and the General Board of Commissioners as established by the said first-recited Act and this Act shall be continued until Parliament shall otherwise determine.

CAP. LXIII.

An Act to amend 'The Merchant Shipping Act, 1854,' 'The Merchant Shipping Act Amendment Act, 1855,' and 'The Customs Consolidation Act, 1853.'—[29th July 1862.]

Wreck and Salvage (Part VIII. of Merchant Shipping Act, 1854).

Extension and Amendment of summary Jurisdiction in

XLIX. The Provisions contained in the Eighth Part of the Principal Act for giving summary Jurisdiction to Two Justices in Salvage Cases and for preventing unnecessary Appeals and Litigation in such Cases, shall be amended as follows; (that is to say,)

- (1.) Such Provision shall extend to all Cases in which the value of the Property saved does not exceed One thousand Pounds, as well as to the Cases provided for by the principal Act: small Salvage Cases.
- (2.) Such Provisions shall be held to apply whether the Salvage Service has been rendered within the Limits of the United Kingdom or not:
- (3.) It shall be lawful for One of her Majesty's Principal Secretaries of State, or in *Ireland* for the Lord Lieutenant or other Chief Governor or Governors, to appoint out of the Justices for any Borough or County a Rota of Justices by whom Jurisdiction in Salvage Cases shall be exercised:
- (4.) When no such Rota is appointed, it shall be lawful for the Salvors, by Writing addressed to the Justice's Clerk, to name One Justice, and for the Owner of the Property saved in like Manner to name the other:
- (5.) If either Party fails to name a Justice within a reasonable Time, the Case may be tried by Two or more Justices at Petty Sessions:
- (6.) It shall be competent for any Stipendiary Magistrate, and also in *England* for any County Court Judge, in *Scotland* for the Sheriff or Sheriff Substitute of any County, and in *Ireland* for the Recorder of any Borough in which there is a Recorder, or for the Chairman of Quarter Sessions in any County, to exercise the same Jurisdiction in Salvage Cases as is given to Two Justices:
- (7.) It shall be lawful for One of her Majesty's Principal Secretaries of State to determine a Scale of Costs to be awarded in Salvage Cases by any such Justices or Court as aforesaid:
- (8.) All the Provisions of the Principal Act relating to summary Proceedings in Salvage Cases, and to the Prevention of unnecessary Appeals in such Cases, shall, except so far as the same are altered by this Act, extend and apply to all such Proceedings, whether under the Principal Act or this Act, or both of such Acts.

L. Whenever any Salvage Question arises, the Receiver of Wreck for the District may, upon Application from either of the Parties, appoint a Valuer to value the Property in respect of which the Salvage Claim is made, and shall, when the Valuation has been returned to him, give a Copy of the Valuation to both Parties; and any Copy of such Valuation, purporting to be signed by the Valuer,

Receiver may appoint a Valuer in Salvage Cases.

and to be attested by the Receiver, shall be received in Evidence in any subsequent Proceeding; and there shall be paid in respect of such Valuation, by the Party applying for the same, such Fee as the Board of Trade may direct.

Jurisdiction of Court of Session in Salvage Cases.

LI. The Words 'Court of Session' in the Four hundred and sixty-eighth Section of the Principal Act shall be deemed to mean and include either Division of the Court of Session or the Lord Ordinary officiating on the Bills during Vacation.

Delivery of Wreck by Receiver not to prejudice Title.

LII. Upon Delivery of Wreck or of the Proceeds of Wrecks by any Receiver to any Person in pursuance of the Provisions of the Eighth Part of the Principal Act, such Receiver shall be discharged from all Liability in respect thereof, but such Delivery shall not be deemed to prejudice or affect any Question concerning the Right or Title to the said Wreck which may be raised by Third Parties, nor shall any such Delivery prejudice or affect any Question concerning the Title to the Soil on which the Wreck may have been found.

Crown Rights to Wreck.

LIII. 'Whereas by the Principal Act it is provided that the Proceeds of Wreck, if the same is not claimed by the Owner within a Year, and if no Person other than her Majesty, her Heirs and Successors, is proved to be entitled thereto, shall, subject to certain Deductions, be paid into the Receipt of her Majesty's Exchequer in such Manner as the Commissioners of the Treasury may direct, and that the same shall be carried to and form Part of the Consolidated Fund of the United Kingdom :

1 Vict. c. 2.

'And whereas Doubts have been entertained whether the said last-recited Provision is consistent with the Arrangements concerning the Hereditary Revenues of the Crown effected by the Act of the First Year of her present Majesty, Chapter Two : And whereas Doubts have also been entertained whether due Provision is made by the said Act for paying to the Revenues of the Duchies of *Lancaster* and *Cornwall* respectively such of the said Proceeds as may belong to those Duchies :'

It is hereby declared, That such of the said Proceeds of Wreck as belong to her Majesty in right of her Crown shall, during the Life of her present Majesty (whom God long preserve), be carried to and form Part of the Consolidated Fund of the United Kingdom, and shall after the Decease of her present Majesty (whom God long preserve) be payable and paid to her Majesty's Heirs and Successors :

And it is hereby further declared, That such of the said Proceeds of Wreck as belong to her Majesty in right of her Duchy of *Lancaster* shall be paid to the Receiver

General of the said Duchy or his sufficient Deputy or Deputies as Part of the Revenues of the said Duchy, and be dealt with accordingly :

And it is hereby further declared and enacted, That the Provision in the Principal Act contained regarding the Sale of unclaimed Wreck to which no Owner establishes his Claim within the Period of One Year, and to which no Admiral, Vice Admiral, Lord of any Manor, or Person other than her Majesty, her Heirs and Successors, is proved to be entitled, is intended, and shall be construed to apply to Wreck of the Sea belonging to her Majesty, her Heirs and Successors, in respect of the Duchy of *Cornwall*, or to the Duke of *Cornwall* for the Time being in respect of his Duchy of *Cornwall* : But that the Proceeds of such Wreck shall, subject to such Deductions as are in the same Act mentioned, form part of the Revenues of the Duchy of *Cornwall*, and be dealt with accordingly.

Liability of Shipowners (Part IX. of Merchant Shipping Act, 1854).

LIV. The Owners of any Ship, whether *British* or Foreign, shall not, in Cases where all or any of the following Events occur without their actual Fault or Privity, that is to say,

Ship-owners' Liability limited.

- (1.) Where any Loss of Life or personal Injury is caused to any Person being carried in such Ship ;
- (2.) Where any Damage or Loss is caused to any Goods, Merchandise, or other Things whatsoever on board any such Ship ;
- (3.) Where any Loss of Life or personal Injury is by reason of the improper Navigation of such Ship as aforesaid caused to any Person carried in any other Ship or Boat ;
- (4.) Where any Loss or Damage is by reason of the improper Navigation of such Ship as aforesaid caused to any other Ship or Boat, or to any Goods, Merchandise, or other Things whatsoever on board any other Ship or Boat ;

be answerable in Damages in respect of Loss of Life or personal Injury, either alone or together with Loss or Damage to Ships, Boats, Goods, Merchandise, or other Things, to an aggregate Amount exceeding Fifteen Pounds for each Ton of their Ship's Tonnage ; nor in respect of Loss or Damage to Ships, Goods, Merchandise, or other Things, whether there be in addition Loss of Life or personal Injury or not, to an aggregate Amount exceeding Eight Pounds for each Ton of the Ship's Tonnage ; such Tonnage to be the registered Tonnage in the Case of

Sailing Ships, and in the Case of Steam Ships the Gross Tonnage without Deduction on account of Engine Room :

In the Case of any Foreign Ship which has been or can be measured according to *British Law*, the Tonnage as ascertained by such Measurement shall, for the Purposes of this Section, be deemed to be the Tonnage of such Ship :

In the Case of any Foreign Ship which has not been and cannot be measured under *British Law*, the Surveyor General of Tonnage in the United Kingdom, and the Chief Measuring Officer in any *British Possession* abroad, shall, on receiving from or by Direction of the Court hearing the Case such Evidence concerning the Dimensions of the Ship as it may be found practicable to furnish, give a Certificate under his Hand, stating what would in his Opinion have been the Tonnage of such Ship if she had been duly measured according to *British Law*, and the Tonnage so stated in such Certificate shall, for the Purposes of this Section, be deemed to be the Tonnage of such Ship.

Limitation
of Invali-
dity of In-
surances.

LV. Insurances effected against any or all of the Events enumerated in the Section last preceding, and occurring without such actual Fault or Privity as therein mentioned, shall not be invalid by reason of the Nature of the Risk.

Proof of
Passengers
on board
lost Ship.

LVI. In any Proceeding under the 506th Section of the Principal Act or any Act amending the same against the Owner of any Ship or Share therein in respect of Loss of Life, the Master's List or the duplicate List of Passengers delivered to the proper Officer of Customs under the 16th Section of 'The Passengers Act, 1855,' shall, in the Absence of Proof to the contrary, be sufficient Proof that the Persons in respect of whose Death any such Prosecution or Proceeding is instituted were Passengers on board such Ship at the Time of their Deaths.

Arrangements concerning Lights, Sailing Rules, Salvage, and Measurement of Tonnage in the Case of Foreign Ships.

Foreign
Ships in
British
Jurisdic-
tion to be
subject to
Regula-
tions in
Table (C.)
in Sche-
dule.

LVII. Whenever Foreign Ships are within *British Jurisdiction*, the Regulations for preventing Collision contained in Table (C.) in the Schedule to this Act, or such other Regulations for preventing Collision as are for the Time being in force under this Act, and all Provisions of this Act relating to such Regulations, or otherwise relating to Collisions, shall apply to such Foreign Ships ; and in any Cases arising in any *British Court of Justice* concerning Matters happening within *British Jurisdiction*, Foreign Ships shall, so far as regards such Regulations and Provisions, be treated as if they were *British Ships*.

Regula-

LVIII. Whenever it is made to appear to her Majesty

that the Government of any Foreign Country is willing that the Regulations for preventing Collision, contained in Table (C.) in the Schedule to this Act, or such other Regulations for preventing Collision as are for the Time being in force under this Act, or any of the said Regulations, or any Provisions of this Act relating to Collisions, should apply to the Ships of such Country when beyond the Limits of *British* Jurisdiction, her Majesty may, by Order in Council, direct that such Regulations, and all Provisions of this Act which relate to such Regulations, and all such other Provisions as aforesaid, shall apply to the Ships of the said Foreign Country, whether within *British* Jurisdiction or not.

tions, when adopted by a Foreign Country, may be applied to its Ships on the High Seas.

LIX. Whenever it is made to appear to her Majesty that the Government of any Foreign Country is willing that Salvage shall be awarded by *British* Courts for Services rendered in saving Life from any Ship belonging to such Country when such Ship is beyond the Limits of *British* Jurisdiction, her Majesty may, by Order in Council, direct that the Provisions of the Principal Act and of this Act, with respect to Salvage for Services rendered in saving Life from *British* Ships, shall in all *British* Courts be held to apply to Services rendered in saving Life from the Ships of such Foreign Country, whether such Services are rendered within *British* Jurisdiction or not.

Provisions concerning Salvage of Life may, with the Consent of any Foreign Country, be applied to its Ships on the High Seas.

LX. Whenever it is made to appear to her Majesty that the Rules concerning the Measurement of Tonnage of Merchant Ships for the Time being in force under the Principal Act have been adopted by the Government of any Foreign Country, and are in force in that Country, it shall be lawful for her Majesty by Order in Council to direct that the Ships of such Foreign Country shall be deemed to be of the Tonnage denoted in their Certificates of Registry or other National Papers; and thereupon it shall no longer be necessary for such Ships to be re-measured in any Port or Place in her Majesty's Dominions, but such Ships shall be deemed to be of the Tonnage denoted in their Certificates of Registry or other Papers in the same Manner, to the same Extent, and for the same Purposes in, to, and for which the Tonnage denoted in the Certificates of Registry of *British* Ships is deemed to be the Tonnage of such Ships.

Ships of Foreign Countries adopting the Rule for Measurement of Tonnage need not be re-measured in this Country.

LXI. Whenever an Order in Council has been issued under this Act, applying any Provision of this Act or any Regulation made by or in pursuance of this Act to the Ships of any Foreign Country, such Ships shall in all Cases arising in any *British* Court be deemed to be subject

Effect of Order in Council.

to such Provision or Regulation, and shall for the Purpose of such Provision or Regulation be treated as if they were *British Ships*.

Orders in Council may be limited as to Time, and qualified.

LXII. In issuing any Order in Council under this Act her Majesty may limit the Time during which it is to remain in operation, and may make the same subject to such Conditions and Qualifications, if any, as may be deemed expedient, and thereupon the Operation of the said Order shall be limited and modified accordingly.

Orders in Council may be revoked and altered.

LXIII. Her Majesty may by Order in Council from Time to Time revoke or alter any Order previously made under this Act.

Orders in Council to be published in London Gazette.

LXIV. Every Order in Council to be made under this Act shall be published in the *London Gazette* as soon as may be after the making thereof; and the Production of a Copy of the *London Gazette* containing such Order shall be received in Evidence, and shall be Proof that the Order therein published has been duly made and issued; and it shall not be necessary to plead such Order specially.

Legal Procedure.

20 & 21 Vict. c. 48, s. 8, not to apply to Proceedings under Board of Trade or this Act, etc.

LXV. Nothing in the Third Section of the Act passed in the Twentieth and Twenty-first Years of the Reign of her present Majesty, Chapter Forty-three, except so much thereof as provides for the Payment of any Fees that may be due to the Clerk of the Justices, shall be deemed to apply to extend to any Proceeding under the Direction of the Board of Trade, or under or by virtue of the Provisions of the Principal Act or this Act, or any Act amending the same.

Delivery of Goods and Lien for Freight.

Interpretation of Terms.

LXVI. The following Terms used in the Sections of this Act hereinafter contained shall have the respective Meanings hereby assigned to them, if not inconsistent with the Context or Subject Matter; that is to say,

'Report.'

The Word 'Report' shall mean the Report required by the Customs Laws to be made by the Master of any importing Ship:

'Entry.'

The Word 'Entry' shall mean the Entry required by the Customs Laws to be made for the Landing or Discharge of Goods from an importing Ship:

'Goods.'

The Word 'Goods' shall include every Description of Wares and Merchandise:

'Wharf.'

The Word 'Wharf' shall include all Wharves, Quays, Docks, and Premises in or upon which any Goods when landed from Ships may be lawfully placed:

'Warehouse.'

The Word 'Warehouse' shall include all Warehouses,

Buildings, and Premises in which Goods when landed from Ships may be lawfully placed :

The Expression ' Wharf Owner ' shall mean the Occupier of any Wharf, as herein-before defined :

Wharf
Owner.

The Expression ' Warehouse Owner ' shall mean the Occupier of any Warehouse as herein-before defined :

' Ware-
house
Owner.'

The Word ' Shipowner ' shall include the Master of the Ship and every other Person authorized to act as Agent for the Owner, or entitled to receive the Freight, Demurrage, or other Charges payable in respect of such Ship :

' Ship-
owner.'

The Expression ' Owner of Goods ' shall include every Person who is for the Time being entitled, either as Owner or Agent for the Owner, to the Possession of the Goods, subject in the Case of a Lien, if any, to such Lien.

' Owner of
Goods.'

LXVII. Where the Owner of any Goods imported in any Ship from Foreign Parts into the United Kingdom fails to make Entry thereof, or having made Entry thereof to land the same or take Delivery thereof and to proceed therewith with all convenient Speed, by the Times severally hereinafter mentioned, the Shipowner may make Entry of and land or unship the said Goods at the Times, in the Manner, and subject to the Conditions following ; (that is to say),

Power to
Shipowner
to enter
and land
Goods in
default of
Entry and
landing by
Owner of
Goods.

(1.) If a Time for the Delivery of the Goods is expressed in the Charter Party, Bill of Lading, or Agreement, then at any Time after the Time so expressed :

(2.) If no Time for the Delivery of the Goods is expressed in the Charter Party, Bill of Lading, or Agreement, then at any Time after the Expiration of Seventy-two Hours, exclusive of a *Sunday* or Holiday, after the Report of the Ship :

(3.) If any Wharf or Warehouse is named in the Charter Party, Bill of Lading, or Agreement, as the Wharf or Warehouse where the Goods are to be placed, and if they can be conveniently there received, the Shipowner in landing them by virtue of this Enactment shall cause them to be placed on such Wharf or in such Warehouse :

(4.) In other Cases the Shipowner in landing Goods by virtue of this Enactment shall place them in or on some Wharf or Warehouse on or in which Goods of a like Nature are usually placed ; such Wharf or Warehouse being, if the Goods are dutiable, a Wharf or Warehouse duly approved by the Commissioners of Customs for the landing of dutiable Goods :

- (5.) If at any Time before the Goods are landed or unshipped the Owner of the Goods is ready and offers to land or take Delivery of the same, he shall be allowed so to do, and his Entry shall in such Case be preferred to any Entry which may have been made by the Shipowner :
- (6.) If any Goods are, for the Purpose of Convenience in assorting the same, landed at the Wharf where the Ship is discharged, and the Owner of the Goods at the Time of such landing has made Entry and is ready and offers to take Delivery thereof, and to convey the same to some other Wharf or Warehouse, such Goods shall be assorted at landing, and shall, if demanded, be delivered to the Owner thereof within Twenty-four Hours after Assortment ; and the Expense of and consequent on such landing and Assortment shall be borne by the Shipowner :
- (7.) If at any Time before the Goods are landed or unshipped the Owner thereof has made Entry for the landing and warehousing thereof at any particular Wharf or Warehouse other than that at which the Ship is discharging, and has offered and been ready to take Delivery thereof, and the Shipowner has failed to make such Delivery, and has also failed at the Time of such Offer to give the Owner of the Goods correct Information of the Time at which such Goods can be delivered, then the Shipowner shall, before landing or unshipping such Goods under the Power hereby given to him, give to the Owner of the Goods or of such Wharf or Warehouse as last aforesaid Twenty-four Hours Notice in Writing of his Readiness to deliver the Goods, and shall, if he lands or unships the same without such Notice, do so at his own Risk and Expense.

If, when Goods are landed, the Shipowner give Notice for that Purpose, Lien for Freight is to continue.

LXVIII. If, at the Time when any Goods are landed from any Ship, and placed in the Custody of any Person as a Wharf or Warehouse Owner, the Shipowner gives to the Wharf or Warehouse Owner Notice in Writing that the Goods are to remain subject to a Lien for Freight or other Charges payable to the Shipowner to an Amount to be mentioned in such Notice, the Goods so landed shall, in the Hands of the Wharf or Warehouse Owner, continue liable to the same Lien, if any, for such Charges as they were subject to before the landing thereof ; and the Wharf or Warehouse Owner receiving such Goods shall retain them until the Lien is discharged as hereinafter mentioned,

and shall, if he fail so to do, make good to the Shipowner any Loss thereby occasioned to him.

LXIX. Upon the Production to the Wharf or Warehouse Owner of a Receipt for the Amount claimed as due, and Delivery to the Wharf or Warehouse Owner of a Copy thereof or of a Release of Freight from the Shipowner, the said Lien shall be discharged.

Lien to be discharged on Proof of Payment.

LXX. The Owner of the Goods may deposit with the Wharf or Warehouse Owner a Sum of Money equal in Amount to the Sum so claimed as aforesaid by the Shipowner, and thereupon the Lien shall be discharged; but without Prejudice to any other Remedy which the Shipowner may have for the Recovery of the Freight.

Lien to be discharged on Deposit with Warehouse Owner.

LXXI. If such Deposit as aforesaid is made with the Wharf or Warehouse Owner, and the Person making the same does not within Fifteen Days after making it give to the Wharf or Warehouse Owner Notice in Writing to retain it, stating in such Notice the Sum, if any, which he admits to be payable to the Shipowner, or, as the Case may be, that he does not admit any Sum to be so payable, the Wharf or Warehouse Owner may, at the Expiration of such Fifteen Days, pay the Sum so deposited over to the Shipowner, and shall by such Payment be discharged from all Liability in respect thereof.

Warehouse Owner may at the End of 15 Days, if no Notice is given, pay Deposit to Shipowner.

LXXII. If such Deposit as aforesaid is made with the Wharf or Warehouse Owner, and the Person making the same does within Fifteen Days after making it give to the Wharf or Warehouse Owner such Notice in Writing as aforesaid, the Wharf or Warehouse Owner shall immediately apprise the Shipowner of such Notice, and shall pay or tender to him out of the Sum deposited the Sum, if any, admitted by such Notice to be payable, and shall retain the Remainder or Balance, or, if no Sum is admitted to be payable, the whole of the Sum deposited, for Thirty Days from the Date of the said Notice; and at the Expiration of such Thirty Days, unless legal Proceedings have in the meantime been instituted by the Shipowner against the Owner of the Goods to recover the said Balance or Sum or otherwise for the Settlement of any Disputes which may have arisen between them concerning such Freight or other Charges as aforesaid, and Notice in Writing of such Proceedings has been served on him, the Wharf or Warehouse Owner shall pay the said Balance or Sum over to the Owner of the Goods, and shall by such Payment be discharged from all Liability in respect thereof.

Course to be taken if Notice to retain is given.

LXXIII. If the Lien is not discharged, and no Deposit is made as herein-before mentioned, the Wharf or Warehouse Owner may, and, if required by the Shipowner,

After 90 Days Warehouse Owner may

- (5.) If at any Time before the Goods are landed or unshipped the Owner of the Goods is ready and offers to land or take Delivery of the same, he shall be allowed so to do, and his Entry shall in such Case be preferred to any Entry which may have been made by the Shipowner :
- (6.) If any Goods are, for the Purpose of Convenience in assorting the same, landed at the Wharf where the Ship is discharged, and the Owner of the Goods at the Time of such landing has made Entry and is ready and offers to take Delivery thereof, and to convey the same to some other Wharf or Warehouse, such Goods shall be assorted at landing, and shall, if demanded, be delivered to the Owner thereof within Twenty-four Hours after Assortment ; and the Expense of and consequent on such landing and Assortment shall be borne by the Shipowner :
- (7.) If at any Time before the Goods are landed or unshipped the Owner thereof has made Entry for the landing and warehousing thereof at any particular Wharf or Warehouse other than that at which the Ship is discharging, and has offered and been ready to take Delivery thereof, and the Shipowner has failed to make such Delivery, and has also failed at the Time of such Offer to give the Owner of the Goods correct Information of the Time at which such Goods can be delivered, then the Shipowner shall, before landing or unshipping such Goods under the Power hereby given to him, give to the Owner of the Goods or of such Wharf or Warehouse as last aforesaid Twenty-four Hours Notice in Writing of his Readiness to deliver the Goods, and shall, if he lands or unships the same without such Notice, do so at his own Risk and Expense.

If, when Goods are landed, the Shipowner give Notice for that Purpose, Lien for Freight is to continue.

LXVIII. If, at the Time when any Goods are landed from any Ship, and placed in the Custody of any Person as a Wharf or Warehouse Owner, the Shipowner gives to the Wharf or Warehouse Owner Notice in Writing that the Goods are to remain subject to a Lien for Freight or other Charges payable to the Shipowner to an Amount to be mentioned in such Notice, the Goods so landed shall, in the Hands of the Wharf or Warehouse Owner, continue liable to the same Lien, if any, for such Charges as they were subject to before the landing thereof ; and the Wharf or Warehouse Owner receiving such Goods shall retain them until the Lien is discharged as hereinafter mentioned,

and shall, if he fail so to do, make good to the Shipowner any Loss thereby occasioned to him.

LXIX. Upon the Production to the Wharf or Warehouse Owner of a Receipt for the Amount claimed as due, and Delivery to the Wharf or Warehouse Owner of a Copy thereof or of a Release of Freight from the Shipowner, the said Lien shall be discharged.

Lien to be discharged on Proof of Payment.

LXX. The Owner of the Goods may deposit with the Wharf or Warehouse Owner a Sum of Money equal in Amount to the Sum so claimed as aforesaid by the Shipowner, and thereupon the Lien shall be discharged; but without Prejudice to any other Remedy which the Shipowner may have for the Recovery of the Freight.

Lien to be discharged on Deposit with Warehouse Owner.

LXXI. If such Deposit as aforesaid is made with the Wharf or Warehouse Owner, and the Person making the same does not within Fifteen Days after making it give to the Wharf or Warehouse Owner Notice in Writing to retain it, stating in such Notice the Sum, if any, which he admits to be payable to the Shipowner, or, as the Case may be, that he does not admit any Sum to be so payable, the Wharf or Warehouse Owner may, at the Expiration of such Fifteen Days, pay the Sum so deposited over to the Shipowner, and shall by such Payment be discharged from all Liability in respect thereof.

Warehouse Owner may at the End of 15 Days, if no Notice is given, pay Deposit to Shipowner.

LXXII. If such Deposit as aforesaid is made with the Wharf or Warehouse Owner, and the Person making the same does within Fifteen Days after making it give to the Wharf or Warehouse Owner such Notice in Writing as aforesaid, the Wharf or Warehouse Owner shall immediately apprise the Shipowner of such Notice, and shall pay or tender to him out of the Sum deposited the Sum, if any, admitted by such Notice to be payable, and shall retain the Remainder or Balance, or, if no Sum is admitted to be payable, the whole of the Sum deposited, for Thirty Days from the Date of the said Notice; and at the Expiration of such Thirty Days, unless legal Proceedings have in the meantime been instituted by the Shipowner against the Owner of the Goods to recover the said Balance or Sum or otherwise for the Settlement of any Disputes which may have arisen between them concerning such Freight or other Charges as aforesaid, and Notice in Writing of such Proceedings has been served on him, the Wharf or Warehouse Owner shall pay the said Balance or Sum over to the Owner of the Goods, and shall by such Payment be discharged from all Liability in respect thereof.

Course to be taken if Notice to retain is given.

LXXIII. If the Lien is not discharged, and no Deposit is made as herein-before mentioned, the Wharf or Warehouse Owner may, and, if required by the Shipowner,

After 90 Days Warehouse Owner may

sell Goods
by Public
Auction.

shall, at the Expiration of Ninety Days from the Time when the Goods were placed in his Custody, or, if the Goods are of a perishable Nature, at such earlier Period as he in his Discretion thinks fit, sell by Public Auction, either for Home Use or Exportation, the said Goods or so much thereof as may be necessary to satisfy the Charges hereinafter mentioned.

Notices of
Sale to be
given.

LXXIV. Before making such Sale the Wharf or Warehouse Owner shall give Notice thereof by Advertisement in Two Newspapers circulating in the Neighbourhood, or in One Daily Newspaper published in *London* and in One local Newspaper, and also, if the Address of the Owner of the Goods has been stated on the Manifest of the Cargo, or on any of the Documents which have come into the Possession of the Wharf or Warehouse Owner, or is otherwise known to him, give Notice of the Sale to the Owner of the Goods by Letter sent by the Post; but the Title of a *bonâ fide* Purchaser of such Goods shall not be invalidated by reason of the Omission to send Notice as herein-before mentioned, nor shall any such Purchaser be bound to inquire whether such Notice has been sent.

Monies
arising
from Sale,
how to be
applied.

LXXV. In every Case of any such Sale as aforesaid the Wharf or Warehouse Owner shall apply the Monies received from the Sale as follows, and in the following Order:

1. If the Goods are sold for Home Use in Payment of any Customs or Excise Duties owing in respect thereof:
2. In Payment of the Expenses of the Sale:
3. In the Absence of any Agreement between the Wharf or Warehouse Owner and the Shipowner concerning the Priority of their respective Charges, in Payment of the Rent, Rates, and other Charges due to the Wharf or Warehouse Owner in respect of the said Goods:
4. In Payment of the Amount claimed by the Shipowner as due for Freight or other Charges in respect of the said Goods:
5. But in case of any Agreement between the Wharf or Warehouse Owner and the Shipowner concerning the Priority of their respective Charges, then such Charges shall have Priority according to the Terms of such Agreement:

and the Surplus, if any, shall be paid to the Owner of the Goods.

Warehouse
Owner's
Rent and
Expenses.

LXXVI. Whenever Goods are placed in the Custody of a Wharf or Warehouse Owner under the Authority of this Act, the said Wharf or Warehouse Owner shall be entitled to Rent in respect of the same, and shall also have Power from Time to Time, at the Expense of the Owner

of the Goods, to do all such reasonable Acts as in the Judgment of the said Wharf or Warehouse Owner are necessary for the proper Custody and Preservation of the said Goods, and shall have a Lien on the said Goods for the said Rent and Expenses.

LXXVII. Nothing in this Act contained shall compel any Wharf or Warehouse Owner to take charge of any Goods which he would not be liable to take charge of if this Act had not passed; nor shall he be bound to see to the Validity of any Lien claimed by any Shipowner under this Act.

Warehouse
Owners
Protection.

LXXVIII. Nothing in this Act contained shall take away or abridge any Powers given by any Local Act to any Harbour Trust, Body Corporate, or Persons whereby they are enabled to expedite the Discharge of Ships or the Landing or Delivery of Goods; nor shall anything in this Act contained take away or diminish any Rights or Remedies given to any Shipowner or Wharf or Warehouse Owner by any Local Act.

Saving
Powers
under
Local Acts.

CAP. LXVIII.

An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works.
—[29th July 1862.]

‘WHEREAS by Law, as now established, the Authors of Paintings, Drawings, and Photographs have no Copyright in such their Works, and it is expedient that the Law should in that respect be amended:’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. The Author, being a *British* Subject or resident within the Dominions of the Crown, of every original Painting, Drawing, and Photograph, which shall be or shall have been made either in the *British* Dominions or elsewhere, and which shall not have been sold or disposed of before the Commencement of this Act, and his Assigns, shall have the sole and exclusive Right of copying, engraving, reproducing, and multiplying such Painting or Drawing, and the Design thereof, or such Photograph, and the Negative thereof, by any Means and of any Size, for the Term of the natural Life of such Author, and Seven Years

Copyright
in Works
hereafter
made or
sold to vest
in the
Author for
his Life
and for
Seven
Years after
his Death.

after his Death; provided that when any Painting or Drawing, or the Negative of any Photograph, shall for the First Time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other Person for a good or a valuable Consideration, the Person so selling or disposing of or making or executing the same shall not retain the Copyright thereof, unless it be expressly reserved to him by Agreement in Writing, signed, at or before the Time of such Sale or Disposition, by the Vendee or Assignee of such Painting or Drawing, or of such Negative of a Photograph, or by the Person for or on whose Behalf the same shall be so made or executed, but the Copyright shall belong to the Vendee or Assignee of such Painting or Drawing, or of such Negative of a Photograph, or to the Person for or on whose Behalf the same shall have been made or executed; nor shall the Vendee or Assignee thereof be entitled to any such Copyright, unless, at or before the Time of such Sale or Disposition, an Agreement in Writing, signed by the Person so selling or disposing of the same, or by his Agent duly authorized, shall have been made to that Effect.

Not to prejudice certain Rights.

II. Nothing herein contained shall prejudice the Right of any Person to copy or use any Work in which there shall be no Copyright, or to represent any Scene or Object, notwithstanding that there may be Copyright in some Representation of such Scene or Object.

Assignments, Licences, etc., to be in Writing.

III. All Copyright under this Act shall be deemed Personal or Moveable Estate, and shall be assignable at Law, and every Assignment thereof, and every Licence to use or copy by any Means or Process the Design or Work which shall be the Subject of such Copyright, shall be made by some Note or Memorandum in Writing, to be signed by the Proprietor of the Copyright, or by his Agent appointed for that Purpose in Writing.

Register of Proprietors of Copyright in Paintings, Drawings, and Photographs to be kept at Stationers Hall, as in 5 & 6 Vict. c. 45.

IV. There shall be kept at the Hall of the Stationers Company, by the Officer appointed by the said Company for the Purposes of the Act passed in the Sixth Year of her present Majesty, intituled *An Act to amend the Law of Copyright*, a Book or Books, entitled 'The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs,' wherein shall be entered a Memorandum of every Copyright to which any Person shall be entitled under this Act, and also of every subsequent Assignment of any such Copyright; and such Memorandum shall contain a Statement of the Date of such Agreement or Assignment, and of the Names of the Parties thereto, and of the Name and Place of Abode of the Person in whom such Copyright shall be vested by virtue thereof, and of the

Name and Place of Abode of the Author of the Work in which there shall be such Copyright, together with a short Description of the Nature and Subject of such Work, and in addition thereto, if the Person registering shall so desire, a Sketch, Outline, or Photograph of the said Work, and no Proprietor of any such Copyright shall be entitled to the Benefit of this Act until such Registration, and no Action shall be sustainable nor any Penalty be recoverable in respect of anything done before Registration.

V. The several Enactments in the said Act of the Sixth Year of her present Majesty contained, with relation to keeping the Register Book thereby required, and the Inspection thereof, the Searches therein, and the Delivery of certified and stamped Copies thereof, the Reception of such Copies in Evidence, the making of false Entries in the said Book, and the Production in Evidence of Papers falsely purporting to be Copies of Entries in the said Book, the Application to the Courts and Judges by Persons aggrieved by Entries in the said Book, and the expunging and varying such Entries, shall apply to the Book or Books to be kept by virtue of this Act, and to the Entries and Assignments of Copyright and Proprietorship therein under this Act, in such and the same Manner as if such Enactments were here expressly enacted in relation thereto, save and except that the Forms of Entry prescribed by the said Act of the Sixth Year of her present Majesty may be varied to meet the Circumstances of the Case, and that the Sum to be demanded by the Officer of the said Company of Stationers for making any Entry required by this Act shall be One Shilling only.

Certain Enactments of 5 & 6 Vict. c. 45, to apply to the Books to be kept under this Act.

VI. If the Author of any Painting, Drawing, or Photograph, in which there shall be subsisting Copyright, after having sold or disposed of such Copyright, or if any other Person, not being the Proprietor for the Time being of Copyright in any Painting, Drawing, or Photograph, shall, without the Consent of such Proprietor, repeat, copy, colourably imitate, or otherwise multiply for Sale, Hire, Exhibition, or Distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for Sale, Hire, Exhibition, or Distribution, any such Work or the Design thereof, or, knowing that any such Repetition, Copy, or other Imitation has been unlawfully made, shall import into any Part of the United Kingdom, or sell, publish, let to Hire, exhibit, or distribute, or offer for Sale, Hire, Exhibition, or Distribution, or cause or procure to be imported, sold, published, let to Hire, distributed, or offered for Sale, Hire,

Penalties on Infringement of Copyright.

Exhibition, or Distribution, any Repetition, Copy, or Imitation of the said Work, or of the Design thereof, made without such Consent as aforesaid, such Person for every such Offence shall forfeit to the Proprietor of the Copyright for the Time being a Sum not exceeding Ten Pounds; and all such Repetitions, Copies, and Imitations made without such Consent as aforesaid, and all Negatives of Photographs made for the Purpose of obtaining such Copies, shall be forfeited to the Proprietor of the Copyright.

Penalties
on fraudu-
lent Pro-
ductions
and Sales.

VII. No Person shall do or cause to be done any or either of the following Acts; that is to say,

First, no Person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any Painting, Drawing, or Photograph, or the Negative thereof, any Name, Initials, or Monogram :

Secondly, no Person shall fraudulently sell, publish, exhibit, or dispose of, or offer for Sale, Exhibition, or Distribution, any Painting, Drawing, or Photograph, or Negative of a Photograph, having thereon the Name, Initials, or Monogram of a Person who did not execute or make such Work :

Thirdly, no Person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any Copy or colourable Imitation of any Painting, Drawing, or Photograph, or Negative of a Photograph, whether there shall be subsisting Copyright therein or not, as having been made or executed by the Author or Maker of the original Work from which such Copy or Imitation shall have been taken :

Fourthly, where the Author or Maker of any Painting, Drawing, or Photograph, or Negative of a Photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the Possession of such Work, if any Alteration shall afterwards be made therein by any other Person, by Addition or otherwise, no Person shall be at liberty, during the Life of the Author or Maker of such Work, without his Consent, to make or knowingly to sell or publish, or offer for Sale, such Work or any Copies of such Work so altered as aforesaid, or of any Part thereof, as or for the unaltered Work of such Author or Maker :

Penalties.

Every Offender under this Section shall upon Conviction forfeit to the Person aggrieved a Sum not exceeding Ten Pounds, or not exceeding double the full Price, if any, at which all such Copies, Engravings, Imitations, or altered

Works shall have been sold or offered for Sale; and all such Copies, Engravings, Imitations, or altered Works shall be forfeited to the Person, or the Assigns or legal Representatives of the Person, whose Name, Initials, or Monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the Penalties imposed by this Section shall not be incurred unless the Person whose Name, Initials, or Monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within Twenty Years next before the Time when the Offence may have been committed.

VIII. All pecuniary Penalties which shall be incurred, and all such unlawful Copies, Imitations, and all other Effects and Things as shall have been forfeited by Offenders, pursuant to this Act, and pursuant to any Act for the Protection of Copyright Engravings, may be recovered by the Person herein-before and in any such Act as aforesaid empowered to recover the same respectively, and hereinafter called the Complainant or the Complainer, as follows:

Recovery
of pecu-
niary Pe-
nalties.

In *England and Ireland*, either by Action against the Party offending, or by summary Proceeding before any Two Justices having Jurisdiction where the Party offending resides:

In Eng-
land and
Ireland.

In *Scotland* by Action before the Court of Session in ordinary Form, or by summary Action before the Sheriff of the County where the offence may be committed or the Offender resides, who, upon Proof of the Offence or Offences, either by Confession of the Party offending, or by the Oath or Affirmation of One or more credible Witnesses, shall convict the Offender, and find him liable to the Penalty or Penalties aforesaid, as also in Expenses, and it shall be lawful for the Sheriff, in pronouncing such Judgment for the Penalty or Penalties and Costs, to insert in such Judgment a Warrant, in the event of such Penalty or Penalties and Costs not being paid, to levy and recover the Amount of the same by Poinding: Provided always, that it shall be lawful to the Sheriff, in the event of his dismissing the Action and assoilzieing the Defender, to find the Complainer liable in Expenses, and any Judgment so to be pronounced by the Sheriff in such summary Application shall be final and conclusive, and not subject to Review by Advocation, Suspension, Reduction, or otherwise.

In Scot-
land.

Court in which Action is pending may make Order for Injunction, etc.

IX. In any Action in any of her Majesty's Superior Courts of Record at *Westminster* and in *Dublin*, for the Infringement of any such Copyright as aforesaid, it shall be lawful for the Court in which such Action is pending, if the Court be then sitting, or if the Court be not sitting then for a Judge of such Court, on the Application of the Plaintiff or Defendant respectively, to make such Order for an Injunction, Inspection, or Account, and to give such Direction respecting such Action, Injunction, Inspection, and Account, and the Proceedings therein respectively, as to such Court or Judge may seem fit.

Importation of pirated Works prohibited.

X. All Repetitions, Copies, or Imitations of Paintings, Drawings, or Photographs, wherein or in the Design whereof there shall be subsisting Copyright under this Act, and all Repetitions, Copies, and Imitations of the Design of any such Painting or Drawing, or of the Negative of any such Photograph, which, contrary to the Provisions of this Act, shall have been made in any Foreign State, or in any Part of the *British* Dominions, are hereby absolutely prohibited to be imported into any Part of the United Kingdom, except by or with the Consent of the Proprietor of the Copyright thereof, or his Agent authorized in Writing; and if the Proprietor of any such Copyright, or his Agent, shall declare that any Goods imported are Repetitions, Copies, or Imitations of any such Painting, Drawing, or Photograph, or of the Negative of any such Photograph, and so prohibited as aforesaid, then such Goods may be detained by the Officers of her Majesty's Customs.

Application in such Cases of Customs Acts.

Saving of Right to bring Action for Damages.

XI. If the Author of any Painting, Drawing, or Photograph, in which there shall be subsisting Copyright, after having sold or otherwise disposed of such Copyright, or if any other Person, not being the Proprietor for the Time being of such Copyright, shall, without the Consent of such Proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for Sale, Hire, Exhibition, or Distribution, any such Work or the Design thereof, or the Negative of any such Photograph, or shall import or cause to be imported into any Part of the United Kingdom, or sell, publish, let to Hire, exhibit, or distribute, or offer for Sale, Hire, Exhibition, or Distribution, or cause or procure to be sold, published, let to Hire, exhibited, or distributed, or offered for Sale, Hire, Exhibition, or Distribution, any Repetition, Copy, or Imitation of such Work, or the Design thereof, or the Negative of any such Photograph, made without such Consent as aforesaid, then every such Proprietor, in addition to

the Remedies hereby given for the Recovery of any such Penalties, and Forfeiture of any such Things as aforesaid, may recover Damages by and in a Special Action on the Case, to be brought against the Person so offending, and may in such Action recover and enforce the Delivery to him of all unlawful Repetitions, Copies, and Imitations, and Negatives of Photographs, or may recover Damages for the Retention or Conversion thereof: Provided that nothing herein contained, nor any Proceeding, Conviction, or Judgment, for any Act hereby forbidden, shall affect any Remedy which any person aggrieved by such Act may be entitled to either at Law or in Equity.

XII. This Act shall be considered as including the Provisions of the Act passed in the Session of Parliament held in the Seventh and Eighth Years of her present Majesty, intituled *An Act to amend the Law relating to International Copyright*, in the same Manner as if such Provisions were Part of this Act.

Provisions
of 7 & 8
Vict. c. 12,
to be con-
sidered as
included in
this Act.

CAP. LXXIX.

An Act to amend the Law relating to Coal Mines.—
[7th August 1862.]

‘ WHEREAS it is expedient to amend an Act passed in the Session holden in the Twenty-third and Twenty-fourth Years of the Reign of her present Majesty, Chapter One hundred and fifty-one, and intituled *An Act for the Regulation and Inspection of Mines*, and herein-after referred to as the “Principal Act”:’ Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

23 & 24
Vict. c.
151.

I. This Act shall apply only to Coal Mines and Ironstone Mines mentioned in the Seventh Section of the Principal Act.

Applica-
tion of Act.

II. The Expression ‘existing Mine’ shall mean a Mine that is actually being worked at the Time of the passing of this Act.

Interpre-
tation of
Terms.

The Expression ‘new Mine’ shall mean a Mine opened after the passing of this Act, or an old Mine the working of which is begun afresh after the passing of this Act.

III. After the passing of this Act it shall not be lawful for the Owner of a new Mine, and after the First Day of January One thousand eight hundred and sixty-five it shall

Prohibi-
tion of
single
Shafts.

not be lawful for the Owner of an existing Mine, to employ any Person in working within such Mine, or to permit any Person to be in such Mine for the Purpose of working therein, unless there are in communication with every Seam of such Mine for the time being at work at least Two Shafts or Outlets, separated by natural Strata of not less than Ten Feet in Breadth, by which Shafts or Outlets distinct Means of Ingress and Egress are available to the Persons employed in the Mine; but it shall not be necessary for the Two Shafts or Outlets to belong to the same Mine, if the Persons therein employed have available Means of Ingress and Egress by not less than Two Shafts or Outlets, One or more of which may belong to another Mine.

This Section shall not apply to opening a new Mine for the Purpose of searching for or proving Minerals, or to any Working for the Purpose of making a Communication between Two or more Shafts, so long as not more than Twenty Persons are employed at any One Time in the said new Mine or Working.

Appeal by
Owner of
existing
Mine to Ar-
bitration.

IV. If the Owner of any existing Mine objects within such Time as is herein-after mentioned, in Writing addressed to One of her Majesty's Principal Secretaries of State, that by reason of the Nature of the Mine, or from its being nearly exhausted, or from any other special Cause, he ought to be exempted from the Obligation of providing an additional Shaft or Outlet in pursuance of this Act, or that he cannot provide an additional Shaft or Outlet within the Time limited by this Act, a Reference shall be made to Arbitration as to whether the Owner ought or ought not, under the Circumstances, to provide an additional Shaft or Outlet, or ought or ought not to have an Extension of Time for providing an additional Shaft or Outlet: If the Result of the Arbitration is in favour of the Owner, he shall, as the Case requires, be relieved from the Obligation of providing an additional Shaft or Outlet, or have such Extension of Time granted to him for providing an additional Shaft or Outlet as may be determined by the Award: If the Result of the Arbitration be against the Owner, or if no Award is made by reason of any Default or Neglect on the Part of the Owner, he shall be bound to comply with the Provisions of this Act, in the same Manner as if this Section had not been enacted.

Mode of
conducting
Arbitra-
tions.

V. Arbitrations, in pursuance of this Act, shall be conducted in manner directed by the Thirteenth Section of the Principal Act in Cases where the Owner, within the Twenty Days therein mentioned, objects to any Alterations in or Additions to Rules, or Rules by way of Substitution proposed by the Secretary of State; but no Objection

made in pursuance of this Act by the Owner of an existing Mine shall be entertained unless it is made within the Times following; that is to say, if he claims to be exempted from the Obligation of providing an additional Shaft or Outlet in pursuance of this Act, within Six Calendar Months after the passing of this Act; and if he claims to have an Extension of Time for providing an additional Shaft or Outlet, within the Six Calendar Months immediately preceding the First Day of *January* One thousand eight hundred and sixty-five.

VI. Any of her Majesty's Superior Courts of Law or Equity may, upon the Application of the Attorney-General acting on behalf of the said Secretary of State, prohibit by Injunction the working of any Mine in which any Person is employed in working, or is permitted to be for the Purpose of working in contravention of the Provisions of this Act, and may award such Costs in the Matter of the Injunction as the Court thinks just; but this Section shall be without Prejudice to any other Remedy permitted by Law for enforcing the Provisions of this Act.

Power to enforce by Injunction Compliance with Act.

VII. No Person shall be precluded by any Agreement made before the passing of this Act from doing such Acts as may be necessary for providing an additional Shaft or Outlet to a Mine where the same is required by this Act, or be liable under any Agreement to any Penalty or Forfeiture for doing such Acts as may be necessary in order to comply with the Provisions of this Act.

Agreements in Contravention of Act illegal.

VIII. This Act shall be construed as One with the Principal Act, and the Powers hereby given shall be deemed to be in addition to and not in derogation of any Powers conferred by the Principal Act, and such last-mentioned Powers may be exercised in the same Manner as if this Act had not been passed.

Construction of Act.

CAP. LXXXV.

An Act to facilitate the Transmission of Moveable Property in Scotland.—[7th August 1862.]

‘WHEREAS it is expedient to facilitate the Transmission of Moveable Estate in *Scotland*:’ Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. From and after the passing of this Act, it shall be competent to any Party, in right of a Personal Bond or of a Conveyance of Moveable Estate, to assign such Bond or Conveyance by Assignation in or as nearly as may be in

Personal Bond or Conveyance of Moveable

Estate may
be assigned
in the Form
set forth in
Schedule
(A.)

the Form set forth in Schedule A. hereto annexed; and it shall be competent to write the Assignment or Assignations on the Bond or Conveyance itself in or as nearly as may be in the Form set forth in Schedule B. hereto annexed; which Assignment shall be registrable in the Books of any Court, in Terms of any Clause of Registration contained in the Bond or Conveyance so assigned; and such Assignment, upon being duly stamped and duly intimated, shall have the same Force and Effect as a duly stamped and duly intimated Assignment according to the Forms at present in use.

Certified
Copy to be
delivered to
Person or
Persons to
whom Inti-
mation
may in any
Case be re-
quisite.

II. An Assignment shall be validly intimated (1) by a Notary Public delivering a Copy thereof, certified as correct, to the Person or Persons to whom Intimation may in any Case be requisite, or (2) by the Holder of such Assignment, or any Person authorized by him, transmitting a Copy thereof certified as correct by Post to such Person; and (in the First Case) a Certificate by such Notary Public in or as nearly as may be in the Form set forth in Schedule C. hereto annexed, and (in the Second Case) a written Acknowledgment by the Person to whom such Copy may have been transmitted by Post as aforesaid of the Receipt of the Copy, shall be sufficient Evidence of such Intimation having been duly made: Provided always, that if the Deed or Instrument containing such Assignment shall likewise contain other Conveyances or Declarations of Trust Purposes, it shall not be necessary to deliver or transmit a full Copy thereof, but only a Copy of such Part thereof as respects the Subject Matter of such Assignment.

As to
Transmis-
sion of Per-
sonal Bond,
etc.

III. Nothing in this Act contained shall prevent the Transmission of any Personal Bond or Conveyance of Moveable Estate, or the Intimation of any Assignment according to the Forms at present in use.

Interpreta-
tion of
Terms ;

IV. The following Words in this Act, and in the Schedules annexed to this Act, shall have the several Meanings hereby assigned to them, unless there be something in the Subject or Context repugnant to such Construction; that is to say, the Word 'Bond' and the Word 'Conveyance' shall extend to and include Personal Bonds for Payment or Performance, Bonds of Caution, Bonds of Guarantee, Bonds of Relief, Bonds and Assignations in Security of every Kind, Decrees of any Court, Policies of Assurance of any Assurance Company or Association in Scotland, whether held by Parties resident in Scotland or elsewhere, Protests of Bills or of Promissory Notes, Dispositions, Assignations, or other Conveyances of Moveable or Personal Property or Effects, Assignations, Translations, and Re-

trocessions, and also Probative Extracts of all such Deeds from the Books of any competent Court; the Word 'Assignment' shall also include Translations and Retrocessions, and Probative Extracts thereof; the Words 'Moveable Estate' shall extend to and include all Personal Debts and Obligations, and Moveable or Personal Property or Effects of every Kind.

V. This Act may be cited for all Purposes as the Short Title.
'Transmission of Moveable Property (Scotland) Act, 1862.'

SCHEDULES REFERRED TO IN THE FOREGOING ACT.

SCHEDULE (A.)

I, *A. B.*, in consideration of, *etc.* [*or otherwise, as the Case may be*], do hereby assign to *C. D.* and his Heirs or Assignees [*or otherwise, as the Case may be,*] the Bond [*or other Deed, describing it,*] granted by *E. F.*, dated, *etc.*, by which [*here specify the Nature of the Deed, and specify also any connecting Title, and any Circumstances requiring to be stated in regard to the Nature and Extent of the Right required.*] In witness whereof, *etc.*

[*Insert Testing Clause in usual Form.*]

SCHEDULE (B.)

I, *A. B.*, in consideration of, *etc.* [*or otherwise, as the Case may be*], do hereby assign to *C. D.* and his Heirs or Assignees [*or otherwise, as the Case may be,*] the foregoing [*or within written*] Bond [*or other Writ or Deed, describing it,*] granted in my Favour [*or otherwise, as the Case may be, specifying any connecting Title, and any Circumstances requiring to be stated in regard to the Nature and Extent of the Right assigned*]. In witness whereof, *etc.*

[*Insert Testing Clause in usual Form.*]

SCHEDULE (C.)

I, *A.*,
Public, do hereby attest and declare, That upon the
Day of and between the Hours of
and I duly intimated to *B.* [*here describe the Party*]
the within written Assignment [*or otherwise, as the Case may be,*] or an Assignment granted by [*here describe it*],
and that by delivering to the said *A.* personally [*or otherwise*] by leaving for the said *A.* within his Dwelling House at *E.*, in the hands of [*here describe the Party*], a full Copy, thereof, [*or if a partial Copy, here quote the Portion of the Deed which has been delivered,*] to be given to him; all of

which was done in presence of *C.* and *D.* [*here name and describe the Two Witnesses*], who subscribe this Attestation along with me. In witness whereof.

[*Insert Testing Clause in usual Form, to be subscribed by the Party and the Two Witnesses.*]

CAP. LXXXVII.

An Act to consolidate and amend the Laws relating to Industrial and Provident Societies.—[7th August 1862.]

15 & 16
Vict. c. 81.

‘ WHEREAS by the Industrial and Provident Societies Act, 1852, it is enacted, that it shall be lawful for any Number of Persons to establish a Society under the Provisions thereof and of the therein-recited Act, for the Purpose of raising by voluntary Subscriptions of the Members thereof a Fund for attaining any Purpose or Object for the Time being authorized by the Laws in force with respect to Friendly Societies or by the said recited Act, by carrying on or exercising in common any Labour, Trade, or Handicraft, or several Labours, Trades, or Handicrafts, except the working of Mines, Minerals, or Quarries beyond the Limits of the United Kingdom of *Great Britain and Ireland*, and also except the Business of Banking, whether in the said United Kingdom or elsewhere; and that the said Act shall apply to all Societies already established for any of the Purposes herein mentioned, so soon as they shall conform to the Provisions hereof: And whereas by an Act passed in the Seventeenth and Eighteenth Years of her present Majesty, Chapter Twenty-five, various Provisions were made for the better enabling legal Proceedings to be carried on in any Matter concerning the Societies formed under the said Act of 1852: And whereas the last-mentioned Act was amended by an Act passed in the First Session of the Nineteenth and Twentieth Years of her present Majesty, Chapter Forty: And whereas various Societies have been formed and are now carrying on Business under the Provisions of the said recited Acts, and it is desirable to consolidate and amend the Laws relating to such Societies:’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows: .

17 & 18
Vict. c. 25.

19 & 20
Vict. c. 40.

Recited
Acts re-
pealed.

I. The Industrial and Provident Societies Act, 1852, and the said recited Acts for the Amendment thereof, are hereby repealed from the passing of this Act.

II. All Societies registered under the Industrial and Provident Societies Act, 1852, shall be entitled to obtain a Certificate of Registration on Application to the Registrar of Friendly Societies, and for which Certificate no Fee shall be payable to the Registrar.

As to Societies registered under recited Acts.

III. Any Number of Persons, not being less than Seven, may establish a Society under this Act for the Purpose of carrying on any Labour, Trade, or Handicraft, whether wholesale or retail, except the working of Mines and Quarries, and except the Business of Banking, and of applying the Profits for any Purposes allowed by the Friendly Societies Acts, or otherwise permitted by Law.

Constitution of Societies under this Act.

IV. The Rules of every such Society shall contain Provisions in respect of the several Matters mentioned in the Schedule annexed to this Act.

Rules.

V. Two Copies of the Rules shall be forwarded to the Registrar of Friendly Societies of *England, Scotland, or Ireland*, according to the Place where the Office of the Society is situate, and shall be dealt with by him in the Manner provided by the Friendly Societies Act, 1855; and he shall thereupon give his Certificate of Registration, and such Certificate shall in all Cases be conclusive Evidence that the Society has been duly registered, and thereupon the Members of such Society shall become a Body Corporate, by the Name therein described, having a perpetual Succession and a Common Seal, with Power to hold Lands and Buildings, with limited Liability.

Registration of Society.

VI. The Certificate of Registration shall vest in the Society all the Property that may at the Time be vested in any Person in trust for the Society; and all legal Proceedings then pending by or against any such Trustee or other Officer on account of the Society may be prosecuted by or against the Society in its registered Name without Abatement.

Certificate to vest all Property in Society now held in trust for Society.

VII. A Copy of the Rules shall be delivered by the Society to every Person, on Demand, on Payment of a Sum not exceeding One Shilling.

Copy of Rules to be delivered on Demand.

VIII. No Society shall be registered under a Name identical with that by which any other existing Society has been registered, or so nearly resembling such Name as to be likely to deceive the Members or the Public, and the Word 'Limited' shall be the last Word in the Name of every Society registered under this Act.

No Society to be registered by same Name as that of any existing Society.

IX. No Member shall be entitled, in any Society registered under this Act, to hold or claim any Interest exceeding the Sum of Two hundred Pounds.

Member's Interests limited to 200£.

X. Every Society registered under this Act shall paint or affix, and shall keep painted or affixed, its Name on the

Publication of Name by a Society.

Outside of every Office or Place in which the Business of the Society is carried on, in a conspicuous Position, in Letters easily legible, and shall have its Name engraven in legible Characters on its Seal, and shall have its Name mentioned in legible Characters in all Notices, Advertisements, and other official Publications of such Society, and in all Bills of Exchange, Promissory Notes, Endorsements, Cheques, and Orders for Money or Goods purporting to be signed by or on behalf of such Company, and in all Bills of Parcels, Invoices, Receipts, and Letters of Credit of the Society.

Penalties
on Non-
publication
of Name,
etc.

XI. If any Society under this Act does not paint or affix, and keep painted or affixed, its Name in manner directed by this Act, it shall be liable to a Penalty not exceeding Five Pounds for not so painting or affixing its Name, and for every Day during which such Name is not so kept painted or affixed; and if any Officer of such Society or any Person on its Behalf uses any Seal purporting to be a Seal of the Society whereon its Name is not so engraven as aforesaid, or issues or authorizes the Issue of any Notice, Advertisement, or other official Publication of such Society, or signs or authorizes to be signed on behalf of such Society any Bill of Exchange, Promissory Note, Endorsement, Cheque, Order for Money or Goods, or issues or authorizes to be issued any Bill of Parcels, Invoice, Receipt, or Letter of Credit of the Society, wherein its Name is not mentioned in manner aforesaid, he shall be liable to a Penalty of Fifty Pounds, and shall further be personally liable to the Holder of any such Bill of Exchange, Promissory Note, Cheque, or Order for Money or Goods, for the Amount thereof, unless the same is duly paid by the Society.

Every So-
ciety to
have a re-
gistered
Office.

Penalty on
Default.

Notice of
Situation of
registered
Office.

Signature
and Effect
of Rules.

XII. Every Society under this Act shall have a registered Office to which all Communications and Notices may be addressed: If any Society registered under this Act carries on Business without having such an Office, it shall incur a Penalty not exceeding Five Pounds for every Day during which Business is so carried on.

XIII. Notice of the Situation of such registered Office, and of any Change therein, shall be given to the Registrar, and recorded by him: Until such Notice is given, the Society shall not be deemed to have complied with the Provisions of this Act.

XIV. The Rules of every Society registered under this Act shall bind the Society, and the Members thereof, to the same Extent as if each Member had subscribed his Name and affixed his Seal thereto, and there were in such Rules contained a Covenant on the Part of himself, his

Heirs, Executors, and Administrators, to conform to such Rules subject to the Provisions of this Act; and all Monies payable by any Member to the Society in pursuance of such Rules shall be deemed to be a Debt due from such Member to the Society.

XV. The Provisions of the Friendly Societies Acts shall apply to Societies registered under this Act in the following Particulars:

Applica-
tion of
Friendly
Societies
Acts to this
Act.

Exemption from Stamp Duties and Income Tax:

Settlements of Disputes by Arbitration or Justices:

Compensation to Members unjustly excluded:

Power of Justices or County Courts in case of Fraud:

Jurisdiction of the Registrar.

XVI. The Provisions of the Friendly Societies Act, 1854, whereby a Member of any Society registered thereunder is allowed to nominate any Persons to whom his Investment in such Society shall be paid, shall extend, in the Case of Societies registered under this Act, to allow any Member thereof to nominate any Persons into whose Name his Interest in such Society at his Decease shall be transferred: Provided nevertheless, that any such Society may, in lieu of making such Transfer, elect to pay to any Persons so nominated the full Value of such Interest.

Power to
Member to
nominate
Persons
into whose
Name his
Interest
may be
transferred
at his
Death.

XVII. Any Society registered under this Act may be wound up either by the Court or voluntarily, in the same Manner and under the same Circumstances under and in which any Company may be wound up under any Acts or Act for the Time being in force for winding up Companies; and all the Provisions of such Acts or Act with respect to winding up shall apply to such Society, with this Exception, that the Court having Jurisdiction in the Winding-up shall be the County Court of the District in which the Office of the Society is situated.

As to the
Winding-
up of So-
cieties.

XVIII. In case of the Dissolution of any such Society, such Society shall nevertheless be considered as subsisting, and be in all respects subject to the Provisions of this Act, so long and so far as any Matters relating to the same remain unsettled, to the Intent that such Society may do all things necessary to the winding-up of the Concerns thereof, and that it may be sued and sue, under the Provisions of this Act, in respect of all Matters relating to such Society.

Dissolution
of Society
not to pre-
vent wind-
ing up of
its Affairs.

XIX. The Provisions of the Joint Stock Companies Acts as to Bills of Exchange and the Admissibility of the Register of Shares in Evidence shall apply to all Societies registered under this Act.

Provisions
of Joint
Stock Com-
panies Acts
to apply.

XX. In the event of a Society registered under this Act being wound up, every present and past Member of such Society shall be liable to contribute to the Assets of the

Liability of
present and
past Mem-

bers of
Society.

Society to an Amount sufficient for Payment of the Debts and Liabilities of the Society, and the Costs, Charges, and Expenses of the Winding-up, and for the Payment of such Sums as may be required for the Adjustment of the Rights of the Contributories amongst themselves, with the Qualifications following; (that is to say,)

- (1.) No past Member shall be liable to contribute to the Assets of the Society if he has ceased to be a Member for a Period of One Year or upwards prior to the Commencement of the Winding-up:
- (2.) No past Member shall be liable to contribute in respect of any Debt or Liability of the Society contracted after the Time at which he ceased to be a Member :
- (3.) No past Member shall be liable to contribute to the Assets of the Society unless it appears to the Court that the existing Members are unable to satisfy the Contributions required to be made by them in order to satisfy all just Demands upon such Society :
- (4.) No Contribution shall be required from any Member exceeding the Amount (if any) unpaid on the Shares in respect of which he is liable as a past or present Member.

Society
may be
constituted
under
Companies
Acts.

XXI. Any Society registered under this Act may be constituted a Company under the Companies Acts, by conforming to the Provisions set forth in such Act, and thereupon shall cease to retain its Registration under this Act.

Members
may in-
spect
Books.

XXII. Every Person or Member having an Interest in the Funds of any Society registered under this Act may inspect the Books and the Names of the Members at all reasonable Hours at the Office of the Society.

Sheriffs'
Jurisdic-
tion in
Scotland.

XXIII. The Sheriff in *Scotland* shall within his County have the like Jurisdiction as is hereby given to the Judge of the County Court in any Matter arising under this Act.

Annual Re-
turns to be
prepared as
Registrar
may direct.

XXIV. A General Statement of the Funds and Effects of any Society registered under this Act shall be transmitted to the Registrar once in every Year, and shall exhibit fully the Assets and Liabilities of the Society, and shall be prepared and made out within such Period, and in such Form, and shall comprise such Particulars as the Registrar shall from Time to Time require; and the Registrar shall have Authority to require such Evidence as he may think expedient of all Matters required to be done, and of all Documents required to be transmitted to him under this Act; and every Member of or any Depositor in any such Society

shall be entitled to receive, on Application to the Treasurer or Secretary of that Society, a Copy of such Statement, without making any Payment for the same.

XXV. All Penalties imposed by this Act, or by the Rules of any Society registered under this Act, may be recovered in a summary Manner before Two Justices, as directed by an Act passed in the Eleventh and Twelfth Years of the Reign of her present Majesty Queen Victoria, Chapter Forty-three, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*. Recovery of Penalties.

XXVI. This Act may be cited as 'The Industrial and Provident Societies Act, 1862.' Short Title.

SCHEDULE OF MATTERS TO BE PROVIDED FOR IN THE RULES.

1. Object and Name, and Place of Office of the Society, which must in all Cases be registered as One of limited Liability.
2. Terms of Admission of Members.
3. Mode of holding Meetings and Right of Voting, and of making or altering Rules.
4. Determination whether the Shares shall be transferable; and in case it be determined that the Shares shall be transferable, Provision for the Form of Transfer and Registration of Shares and for the Consent of the Committee of Management and Confirmation by the General Meeting of the Society; and in case Shares shall not be transferable, Provision for paying to Members Balance due to them on withdrawing from the Society.
5. Provision for the Audit of Accounts.
6. Power to invest Part of Capital in another Society; provided that no such Investment be made in any other Society not registered under this Act, or the Joint Stock Companies Act, as a Society or Company with limited Liability.
7. Power and Mode of withdrawing from the Society, and Provisions for the Claims of Executors, Administrators, or Assigns of Members.
8. Mode of Application of Profits.
9. Appointment of Managers and other Officers, and their respective Powers and Remuneration.

CAP. LXXXVIII.

An Act to amend the Law relating to the fraudulent marking of Merchandise.—[7th August 1862.]

‘WHEREAS it is expedient to amend the Laws relating to the fraudulent marking of Merchandise, and to the Sale of Merchandise falsely marked for the Purpose of Fraud :’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Construc-
tion of
Words.

I. In the Construction of this Act the Word ‘Person’ shall include any Person, whether a Subject of her Majesty or not, and any Body Corporate or Body of the like Nature, whether constituted according to the Law of this Country or of any of her Majesty’s Colonies or Dominions, or according to the Law of any Foreign Country, and also any Company, Association, or Society of Persons, whether the Members thereof be Subjects of her Majesty or not; or some of such Persons Subjects of her Majesty and some of them not, and whether such Body Corporate, Body of the like Nature, Company, Association, or Society be established or carry on Business within her Majesty’s Dominions or elsewhere, or partly within her Majesty’s Dominions and partly elsewhere; the Word ‘Mark’ shall include any Name, Signature, Word, Letter, Device, Emblem, Figure, Sign, Seal, Stamp, Diagram, Label, Ticket, or other Mark of any other Description; and the Expression ‘Trade Mark’ shall include any and every such Name, Signature, Word, Letter, Device, Emblem, Figure, Sign, Seal, Stamp, Diagram, Label, Ticket, or other Mark as aforesaid lawfully used by any Person to denote any Chattel, or (in *Scotland*) any Article of Trade, Manufacture, or Merchandise, to be an Article or Thing of the Manufacture, Workmanship, Production, or Merchandise of such Person, or to be an Article or Thing of any peculiar or particular Description made or sold by such Person, and shall also include any Name, Signature, Word, Letter, Number, Figure, Mark, or Sign which in pursuance of any Statute or Statutes for the Time being in force relating to registered Designs is to be put or placed upon or attached to any Chattel or Article during the Existence or Continuance of any Copyright or other sole Right acquired under the Provisions of such Statutes or any of them; the Word ‘Misdemeanor’ shall include Crime and Offence

in *Scotland*; and the Word 'Court' shall include any Sheriff or Sheriff Substitute in *Scotland*.

II. Every Person who, with Intent to defraud, or to enable another to defraud any Person, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any Trade Mark, or shall apply, or cause or procure to be applied, any Trade Mark or any forged or counterfeited Trade Mark to any Chattel or Article, not being the Manufacture, Workmanship, Production, or Merchandise of any Person denoted or intended to be denoted by such Trade Mark, or denoted or intended to be denoted by such forged or counterfeited Trade Mark, or not being the Manufacture, Workmanship, Production, or Merchandise of any Person whose Trade Mark shall be so forged or counterfeited, or shall apply, or cause or procure to be applied, any Trade Mark or any forged or counterfeited Trade Mark to any Chattel or Article, not being the particular or peculiar Description of Manufacture, Workmanship, Production, or Merchandise denoted or intended to be denoted by such Trade Mark or by such forged or counterfeited Trade Mark, shall be guilty of a Misdemeanor, and every Person so committing a Misdemeanor shall also forfeit to her Majesty every Chattel and Article belonging to such Person to which he shall have so unlawfully applied, or caused or procured to be applied, any such Trade Mark or forged or counterfeited Trade Mark as aforesaid, and every Instrument in the Possession or Power of such Person, and by means of which any such Trade Mark, or forged or counterfeited Trade Mark as aforesaid, shall have been so applied, and every Instrument in the Possession or Power of such Person for applying any such Trade Mark or forged or counterfeit Trade Mark as aforesaid, shall be forfeited to her Majesty; and the Court before which any such Misdemeanor shall be tried may order such forfeited Articles as aforesaid to be destroyed or otherwise disposed of as such Court shall think fit.

Forging a Trade Mark or falsely applying any Trade Mark with Intent to defraud, a Misdemeanor.

III. Every Person who, with Intent to defraud, or to enable another to defraud, any Person, shall apply or cause or procure to be applied any Trade Mark or any forged or counterfeited Trade Mark to any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing in, on, or with which any Chattel or Article shall be intended to be sold or shall be sold or uttered or exposed for Sale, or intended for any Purpose of Trade or Manufacture, or shall enclose or place any Chattel or Article, or cause or procure any Chattel or Article to be enclosed or placed, in, upon, under, or with any Cask,

Applying a forged Trade Mark to any Vessel, Case, Wrapper, etc., in or with which any Article is sold or intended to be sold, a Misdemeanor.

Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing to which any Trade Mark shall have been falsely applied, or to which any forged or counterfeited Trade Mark shall have been applied, or shall apply or attach or cause or procure to be applied or attached to any Chattel or Article any Case, Cover, Reel, Ticket, Label, or other Thing to which any Trade Mark shall have been falsely applied, or to which any forged or counterfeited Trade Mark shall have been applied, or shall enclose, place, or attach any Chattel or Article, or cause or procure any Chattel or Article to be enclosed, placed, or attached, in, upon, under, with, or to any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing having thereon any Trade Mark of any other Person, shall be guilty of a Misdemeanor, and every Person so committing a Misdemeanor shall also forfeit to her Majesty every such Chattel and Article, and also every such Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing as aforesaid in the Possession or Power of such Person; and every other similar Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing made to be used in like Manner as aforesaid, and every Instrument in the Possession or Power of such Person, and by means of which any such Trade Mark or forged or counterfeited Trade Mark as aforesaid shall have been applied, and also every Instrument in the Possession or Power of such Person for applying any such Trade Mark or forged or counterfeit Trade Mark as aforesaid, shall be forfeited to her Majesty; and the Court before which any such Misdemeanor shall be tried may order such forfeited Articles as aforesaid to be destroyed or otherwise disposed of as such Court shall think fit.

Selling Articles with forged or false Trade Marks after 31st December 1868, Penalty equal to Value of Article sold, and a Sum not exceeding 5*l.* nor less than 10*s.*

IV. Every Person who, after the Thirty-first Day of *December* One thousand eight hundred and sixty-three, shall sell, utter, or expose either for Sale or for any Purpose of Trade or Manufacture, or cause or procure to be sold, uttered, or exposed for Sale or other Purpose as aforesaid, any Chattel or Article, together with any forged or counterfeited Trade Mark, which he shall know to be forged or counterfeited, or together with the Trade Mark of any other Person applied or used falsely or wrongfully or without lawful Authority or Excuse, knowing such Trade Mark of another Person to have been so applied or used as aforesaid, and that whether any such Trade Mark or forged or counterfeited Trade Mark as aforesaid, together with which any such Chattel or Article shall be sold, uttered, or exposed for Sale or other Purpose as aforesaid, shall be

in, upon, about, or with such Chattel or Article, or in, upon, about, or with any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing in, upon, about, or with which such Chattel or Article shall be so sold or uttered or exposed for Sale or other Purpose as aforesaid, shall for every such Offence forfeit and pay to her Majesty a Sum of Money equal to the Value of the Chattel or Article so sold, uttered, offered, or exposed for Sale or other Purpose as aforesaid, and a further Sum not exceeding Five Pounds and not less than Ten Shillings.

V. Every Addition to and every Alteration of, and also every Imitation of any Trade Mark which shall be made, applied, or used with Intent to defraud, or to enable any other Person to defraud, or which shall cause a Trade Mark with such Alteration or Addition, or shall cause such Imitation of a Trade Mark to resemble any genuine Trade Mark so or in such Manner as to be calculated or likely to deceive, shall be and be deemed to be a false, forged, and counterfeited Trade Mark within the Meaning of this Act; and every Act of making, applying, or otherwise using any such Addition to or Alteration of a Trade Mark or any such Imitation of a Trade Mark as aforesaid done by any Person with Intent to defraud, or to enable any other Person to defraud, shall be and be deemed to be forging and counterfeiting a Trade Mark within the Meaning of this Act.

Additions to and Alterations of Trade Marks made with intent to defraud to be deemed Forgeries.

VI. Where any Person who, at any Time after the Thirty-first Day of *December* One thousand eight hundred and sixty-three, shall have sold, uttered, or exposed for Sale or other Purpose as aforesaid, or shall have caused or procured to be sold, uttered, or exposed for Sale or other Purpose as aforesaid, any Chattel or Article, together with any forged or counterfeited Trade Mark, or together with the Trade Mark of any other Person used without lawful Authority or Excuse as aforesaid, and that whether any such Trade Mark, or such forged or counterfeited Trade Mark as aforesaid, be in, upon, about, or with such Chattel or Article, or in, upon, about, or with any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing in, upon, about, or with which such Chattel or Article shall have been sold or exposed for Sale, such Person shall be bound, upon Demand in Writing delivered to him or left for him at his last known Dwelling House, or at the Place of Sale or Exposure for Sale, by or on the Behalf of any Person whose Trade Mark shall have been so forged or counterfeited, or used without lawful Authority or Excuse as aforesaid, to give to the Person requiring the same, or his Attorney or Agent, within Forty-eight Hours after such Demand, full

Any person who, after 31st December 1863, shall have sold an Article having a false Trade Mark to be bound to give Information where he procured it.

Power to
Justices to
summon
Parties re-
fusing to
give Infor-
mation.

Penalty for
Refusal 5*l*.

Marking
any false
Indication
of Quan-
tity, etc.,
upon an
Article
with Intent
to defraud,
Penalty a
Sum equal
to the Value
of the Arti-
cle and the
further
Sum not
exceeding
5*l* and not
less than
10*s*.

Selling or
exposing

Information in Writing of the Name and Address of the Person from whom he shall have purchased or obtained such Chattel or Article, and of the Time when he obtained the same; and it shall be lawful for any Justice of the Peace, on Information on Oath of such Demand and Refusal, to summon before him the Party refusing, and on being satisfied that such Demand ought to be complied with to order such Information to be given within a certain Time to be appointed by him; and any such Party who shall refuse or neglect to comply with such Order shall for every such Offence forfeit and pay to her Majesty the Sum of Five Pounds, and such Refusal or Neglect shall be *primâ facie* Evidence that the Person so refusing or neglecting had full Knowledge that the Trade Mark, together with which such Chattel or Article was sold, uttered, or exposed for Sale or other Purpose as aforesaid, at the Time of such selling, uttering, or exposing, was a forged, counterfeited, and false Trade Mark, or was the Trade Mark of a Person which had been used without lawful Authority or Excuse, as the Case may be.

VII. Every Person who, with Intent to defraud or to enable another to defraud, shall put or cause or procure to be put upon any Chattel or Article, or upon any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing, together with which any Chattel or Article shall be intended to be or shall be sold or uttered or exposed for Sale, or for any Purpose of Trade or Manufacture, or upon any Case, Frame, or other Thing in or by means of which any Chattel or Article shall be intended to be or shall be exposed for Sale, any false Description, Statement, or other Indication of or respecting the Number, Quantity, Measure, or Weight of such Chattel or Article, or any Part thereof, or of the Place or Country in which such Chattel or Article shall have been made, manufactured, or produced, or shall put or cause or procure to be put upon any such Chattel or Article, Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or Thing as aforesaid, any Word, Letter, Figure, Signature, or Mark for the Purpose of falsely indicating such Chattel or Article, or the Mode of manufacturing or producing the same, or the Ornamentation, Shape, or Configuration thereof, to be the Subject of any existing Patent, Privilege, or Copyright, shall for every such Offence forfeit and pay to her Majesty a Sum of Money equal to the Value of the Chattel or Article so sold or uttered or exposed for Sale, and a further Sum not exceeding Five Pounds and not less than Ten Shillings.

VIII. Every Person who, after the Thirty-first Day of

December One thousand eight hundred and sixty-three, shall sell, utter, or expose for Sale or for any Purpose of Trade or Manufacture, or shall cause or procure to be sold, uttered, or exposed for Sale or other Purpose as aforesaid, any Chattel or Article upon which shall have been, to his Knowledge, put, or upon any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing together with which such Chattel or Article shall be sold or uttered or exposed for Sale or other Purpose as aforesaid, shall have been so put, or upon any Case, Frame, or other Thing used or employed to expose or exhibit such Chattel or Article for Sale shall have been so put, any false Description, Statement, or other Indication of or respecting the Number, Quantity, Measure, or Weight of such Chattel or Article or any Part thereof, or the Place or Country in which such Chattel or Article shall have been made, manufactured, or produced, shall for every such Offence forfeit and pay to her Majesty a Sum not exceeding Five Pounds and not less than Five Shillings.

for Sale, after the 31st December 1863, Articles with false Statement of Quantities, etc., Penalty not more than 5*l*. or less than 5*s*.

IX. Provided always, That the Provisions of this Act shall not be construed so as to make it any Offence for any Person to apply to any Chattel or Article, or to any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing with which such Chattel or Article shall be sold or intended to be sold, any Name, Word, or Expression generally used for indicating such Chattel or Article to be of some particular Class or Description of Manufacture only, or so as to make it any Offence for any Person to sell, utter, or offer or expose for Sale any Chattel or Article to which, or to any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing sold therewith, any such generally used Name, Word, or Expression as aforesaid shall have been applied.

Provido that it shall not be an Offence to apply Names or Words known to be used for indicating particular Classes of Manufactures.

X. In every Indictment, Pleading, Proceeding, and Document whatsoever in which any Trade Mark shall be intended to be mentioned, it shall be sufficient to mention or state the same to be a Trade Mark without further or otherwise describing such Trade Mark, or setting forth any Copy or Fac-simile thereof; and in every Indictment, Pleading, Proceeding, and Document whatsoever in which it shall be intended to mention any forged or counterfeit Trade Mark, it shall be sufficient to mention or state the same to be a forged or counterfeit Trade Mark without further or otherwise describing such forged or counterfeit Trade Mark, or setting forth any Copy or Fac-simile thereof.

Description of Trade Marks and forged Trade Marks in Indictments, etc.

XI. The Provisions in this Act contained of or con-

Conviction not to af-

fect any
Right or
Civil Re-
medy.

cerning any Act, or any Proceeding, Judgment, or Conviction for any Act hereby declared to be a Misdemeanor or Offence, shall not nor shall any of them take away, diminish, or prejudicially affect any Suit, Process, Proceeding, Right, or Remedy which any Person aggrieved by such Act may be entitled to at Law, in Equity, or otherwise, and shall not nor shall any of them exempt or excuse any Person from answering or making Discovery upon Examination as a Witness or upon Interrogatories, or otherwise, in any Suit or other Civil Proceeding: Provided always, that no Evidence, Statement, or Discovery which any Person shall be compelled to give or make shall be admissible in Evidence against such Person in support of any Indictment for a Misdemeanor at Common Law or otherwise, or of any Proceeding under the Provisions of this Act.

Intent to
defraud,
etc., any
particular
Person
need not be
alleged in
an Indict-
ment, etc.,
or proved.

XII. In every Indictment, Information, Conviction, Pleading, and Proceeding against any Person for any Misdemeanor or other Offence against the Provisions of this Act in which it shall be necessary to allege or mention an Intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the Person accused of having done any Act which is hereby made a Misdemeanor or other Offence did such Act with Intent to defraud, or with Intent to enable some other Person to defraud, without alleging or mentioning an Intent to defraud any particular Person; and on the Trial of any such Indictment or Information for any such Misdemeanor, and on the Hearing of any Information or Charge of or for any such other Offence as aforesaid, and on the Trial of any Action against any Person to recover a Penalty for any such other Offence as aforesaid, it shall not be necessary to prove an Intent to defraud any particular Person, or an Intent to enable any particular Person to defraud any particular Person, but it shall be sufficient to prove with respect to every such Misdemeanor and Offence that the Person accused did the Act charged with Intent to defraud, or with Intent to enable some other Person to defraud, or with the Intent that any other Person might be enabled to defraud.

Persons
aiding in
Misdemeanor
guilty.
Punish-
ment for
Misdemeanor
under this
Act.

XIII. Every Person who shall aid, abet, counsel, or procure the Commission of any Offence which is by this Act made a Misdemeanor shall also be guilty of a Misdemeanor.

XIV. Every Person who shall be convicted or found guilty of any Offence which is by this Act made a Misdemeanor shall be liable, at the Discretion of the Court and as the Court shall award, to suffer such Punishment by Imprisonment for not more than Two Years, with or with-

out Hard Labour, or by Fine, or both by Imprisonment with or without Hard Labour and Fine, and also by Imprisonment until the Fine (if any) shall have been paid and satisfied.

XV. In every Case in which any Person shall have committed or done any Offence or Act whereby he shall have forfeited or become liable to pay to her Majesty any of the Penalties or sums of Money mentioned in the Provisions of this Act, every such Penalty or Sum of Money shall or may be recovered in *England, Wales, or Ireland*, in an Action of Debt, which any Person may as Plaintiff for and on behalf of her Majesty commence and prosecute to Judgment in any Court of Record, and the Amount of every such Penalty or Sum of Money to be recovered in any such Action shall or may be determined by the Jury (if any) sworn to try any Issue in such Action, and if there shall be no such Jury then by the Court or some other Jury, as the Court shall think fit, or instead of any such Action being commenced such Penalty or Sum of Money shall or may in *England or Wales* be recovered by a summary Proceeding before Two Justices of the Peace having Jurisdiction in the County or Place where the Party offending shall reside or have any Place of Business, or in the County or Place in which the Offence shall have been committed; and shall or may in *Ireland* be recovered in like Manner by Civil Bill in the Civil Bill Court of the County or Place in which the Offence was committed, or in which the Offender shall reside, or have any Place of Business; and shall or may in *Scotland* be recovered by Action before the Court of Session in ordinary Form, or by summary Action before the Sheriff of the County where the Offence shall have been committed or the Offender may reside or have any Place of Business, which Sheriff, upon Proof of the Offence, either by the Confession of the Person offending or by the Oath or Affirmation of One or more credible Witnesses, shall convict the Offender, and find him liable in the Penalty or Penalties aforesaid, as also in Expenses; and it shall be lawful for the Sheriff in pronouncing such Judgment for the Penalty or Penalties and Costs to insert in such Judgment a Warrant, in the event of such Penalty or Penalties and Costs not being paid, to levy and recover the Amount of the same by Pounding; Provided always, that it shall be lawful to the Sheriff, in the event of his dismissing the Action and assailing the Defender, to find the Complainer liable in Expenses, and any Judgment so to be pronounced by the Sheriff in such summary Action shall be final and conclusive, and not subject to Review by Advocation, Suspension, Reduction, or otherwise.

Recovery
of Penalties.

Summary
Proceed-
ings before
Justices to
be within
11 & 12
Vict. c. 43.

XVI. In every Case in which any such Penalty or Sum of Money forfeited to her Majesty as herein-before mentioned shall be sought to be recovered by a summary Proceeding before Two Justices of the Peace, the Offence or Act by the committing or doing of which such Penalty or Sum of Money shall have been so forfeited shall be and be deemed to be an Offence and Act within the Meaning of a Statute passed in the Twelfth Year of the Reign of her present Majesty, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*; and the Information, Conviction of the Offender, and other Proceedings for the Recovery of the Penalty or Sum so forfeited shall be had according to the Provisions of the said Act.

In Actions
Penalties
to be ac-
counted for
in like
Manner as
other
Monies
payable to
the Crown,
and Plain-
tiffs to re-
cover full
Costs of
Suit.

XVII. In every Case in which Judgment shall be obtained in any such Action as aforesaid for the Amount of any such Penalty or Sum of Money forfeited to her Majesty, the Amount thereof shall be paid by the Defendant to the Sheriff or the Officer of the Court, who shall account for the same in like Manner as other Monies payable to her Majesty, and, if it be not paid, may be recovered, or the Amount thereof levied, or the Payment thereof enforced, by Execution or other proper Proceeding, as Money due to her Majesty; and the Plaintiff suing on behalf of her Majesty, upon obtaining Judgment, shall be entitled to recover and have Execution for all his Costs of Suit, which shall include a full Indemnity for all Costs and Charges which he shall or may have expended or incurred in, about, or for the Purposes of the Action, unless the Court, or a Judge thereof, shall direct that Costs of the ordinary Amount only shall be allowed.

Limita-
tions of
Actions,
etc

XVIII. No Person shall commence any Action or Proceeding for the Recovery of any Penalty, or procuring the Conviction of any Offender in manner herein-before provided, after the Expiration of Three Years next after the committing of the Offence, or One Year next after the first Discovery thereof by the Person proceeding.

After 31st
December
1863 Ven-
dor of an
Article
with a
Trade
Mark to be
deemed to
contract
that the
Mark is
genuine.

XIX. In every Case in which at any Time after the Thirty-first Day of *December* One thousand eight hundred and sixty-three any Person shall sell or contract to sell (whether by Writing or not) to any other Person any Chattel or Article with any Trade Mark thereon, or upon any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing together with which such Chattel or Article shall be sold or contracted to be sold, the Sale or Contract to sell shall in every such Case be deemed to have been made with a Warranty or

Contract by the Vendor to or with the Vendee that every Trade Mark upon such Chattel or Article, or upon any such Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some Writing signed by or on behalf of the Vendor, and delivered to and accepted by the Vendee.

XX. In every Case in which at any Time after the Thirty-first Day of *December* One thousand eight hundred and sixty-three any Person shall sell or contract to sell (whether by Writing or not) to any other Person any Chattel or Article upon which, or upon any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing together with which such Chattel or Article shall be sold or contracted to be sold, any Description, Statement, or other Indication of or respecting the Number, Quantity, Measure, or Weight of such Chattel or Article, or the Place or Country in which such Chattel or Article shall have been made, manufactured, or produced, the Sale or Contract to sell shall in every such Case be deemed to have been made with a Warranty or Contract by the Vendor to or with the Vendee that no such Description, Statement, or other Indication was in any material respect false or untrue, unless the contrary shall be expressed in some Writing signed by or on behalf of the Vendor, and delivered to and accepted by the Vendee.

After 31st December 1863 Vendor of an Article with Description upon it of its Quantity to be deemed to contract that the Description was true.

XXI. In every Case in any Suit at Law or in Equity against any Person for forging or counterfeiting any Trade Mark, or for fraudulently applying any Trade Mark, to any Chattel or Article, or for selling, exposing for Sale, or uttering any Chattel or Article with any Trade Mark falsely or wrongfully applied thereto, or with any forged or counterfeit Trade Mark applied thereto, or for preventing the Repetition or Continuance of any such wrongful Act, or the Committal of any similar Act, in which the Plaintiff shall obtain a Judgment or Decree against the Defendant, the Court shall have Power to direct every such Chattel and Article to be destroyed or otherwise disposed of; and in every such Suit in a Court of Law the Court shall or may upon giving Judgment for the Plaintiff award a Writ of Injunction or Injunctions to the Defendant commanding him to forbear from committing and not by himself or otherwise to repeat or commit any Offence or wrongful Act of the like Nature as that of which he shall or may have been convicted by such Judgment, and any Dis-

In Suits at Law or in Equity against Persons for using forged Trade Marks, Court may order Article to be destroyed, and may award Injunction, etc.

obedience of any such Writ of Injunction or Injunctions shall be punished as a Contempt of Court; and in every such Suit at Law or in Equity it shall be lawful for the Court or a Judge thereof to make such Order as such Court or Judge shall think fit for the Inspection of every or any Manufacture or Process carried on by the Defendant in which any such forged or counterfeit Trade Mark, or any such Trade Mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any Chattel, Article, and Thing in the Possession or Power of the Defendant alleged to have thereon or in any way attached thereto any forged or counterfeit Trade Mark, or any Trade Mark falsely or wrongfully applied, and every or any Instrument in the Possession or Power of the Defendant used or intended to be or capable of being used for producing or making any forged or counterfeit Trade Mark, or Trade Mark alleged to be forged or counterfeit, or for falsely or wrongfully applying any Trade Mark; and any Person who shall refuse or neglect to obey any such Order shall be guilty of a Contempt of Court.

Persons ag-
grieved by
Forgeries
may re-
cover Da-
mages
against the
guilty Par-
ties.

XXII. In every Case in which any Person shall do or cause to be done any of the wrongful Acts following; (that is to say,) shall forge or counterfeit any Trade Mark; or for the Purpose of Sale, or for the Purpose of any Manufacture or Trade, shall apply any forged or counterfeit Trade Mark to any Chattel or Article, or to any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or Thing in or with which any Chattel or Article shall be intended to be sold or shall be sold or uttered or exposed for Sale, or for any Purpose of Trade or Manufacture; or shall inclose or place any Chattel or Article in, upon, under, or with any Cask, Bottle, Stopper, Vessel, Case, Cover, Wrapper, Band, Reel, Ticket, Label, or other Thing to which any Trade Mark shall have been falsely applied, or to which any forged or counterfeit Trade Mark shall have been applied; or shall apply or attach to any Chattel or Article any Case, Cover, Reel, Wrapper, Band, Ticket, Label, or other Thing to which any Trade Mark shall have been falsely applied, or to which any forged or counterfeit Trade Mark shall have been applied; or shall inclose, place, or attach any Chattel or Article in, upon, under, with, or to any Cask, Bottle, Stopper, Vessel, Case, Cover, Reel, Wrapper, Band, Ticket, Label, or other Thing having thereon any Trade Mark of any other Person; every Person aggrieved by any such wrongful Act shall be entitled to maintain an Action or Suit for Damages in respect thereof against the Person who shall be guilty of having

done such Act or causing or procuring the same to be done, and for preventing the Repetition or Continuance of the wrongful Act, and the Committal of any similar Act.

XXIII. In every Action which any Person shall under the Provisions of this Act commence as Plaintiff for or on behalf of her Majesty for recovering any Penalty or Sum of Money, if the Defendant shall obtain Judgment, he shall be entitled to recover his Costs of Suit, which shall include a full Indemnity for all the Costs, Charges, and Expenses by him expended or incurred in, about, or for the Purposes of the Action, unless the Court or a Judge thereof shall direct that Costs of the ordinary Amount only shall be allowed.

Defendant obtaining a Verdict to have full Indemnity for Costs.

XXIV. In any Action which any Person shall, under the Provisions of this Act, commence as Plaintiff for or on behalf of her Majesty for recovering any Penalty or Sum of Money, if it shall be shown to the Satisfaction of the Court or a Judge thereof that the Person suing as Plaintiff for or on behalf of her Majesty has no ground for alleging that he has been aggrieved by the committing of the alleged Offence in respect of which the Penalty or Sum of Money is alleged to have become payable, and also that the Person so suing as Plaintiff is not resident within the Jurisdiction of the Court, or not a Person of sufficient Property to be able to pay any Costs which the Defendant may recover in the Action, the Court or Judge shall or may order that the Plaintiff shall give Security by the Bond or Recognizance of himself and a Surety, or by the Deposit of a Sum of Money, or otherwise, as the Court or Judge shall think fit, for the Payment to the Defendant of any Costs which he may be entitled to recover in the Action.

A Plaintiff suing for a Penalty may be compelled to give Security for Costs.

XXV. Nothing in this Act contained shall be construed to affect the Rights and Privileges of the Corporation of Cutlers of the Liberty of *Hallamshire* in the County of *York*, nor shall anything in this Act contained be construed in any way to repeal or make void any of the Provisions contained in the Fifty-ninth *George Third*, Chapter Seven, intituled *An Act to regulate the Cutlery Trade in England*.

Act not to affect the Corporation of Cutlers of *Hallamshire*, nor to repeal 59 G. 3, c. 7.

XXVI. The Expression 'The Merchandise Marks Act, 1862,' shall be a sufficient Description of this Act.

Short Title.

CAP. XCVII.

An Act to regulate and amend the Law respecting the Salmon Fisheries of Scotland.—[7th August 1862.]

'WHEREAS it is expedient that the Acts relating to the Salmon Fisheries in *Scotland* should be amended, and that

further Provisions should be made for the Regulation of Fisheries, the Removal of Obstructions, and the Prevention of illegal fishing :’ Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Short Title.

I. This Act may be cited for all Purposes as ‘The Salmon Fisheries (*Scotland*) Act, 1862.’

Interpretation of Terms.

II. The following Words and Expressions in this Act shall have the Meanings hereby assigned to them, unless such Meanings be repugnant to or inconsistent with the Context :

‘Commissioners’ shall mean the Commissioners appointed and acting under the Authority of this Act for the Time being :

‘Clerk’ shall mean the Clerk to be appointed by any District Board :

‘Sheriff’ shall mean the Sheriff of the County in *Scotland* of which he is Sheriff, and shall include Sheriff’s Substitute :

‘Justice’ or ‘Justices’ shall mean any Justice or Justices of the Peace acting for the County, City, or Burgh where the Matter requiring the Cognizance of such Justice or Justices shall arise :

‘Secretary of State’ shall mean One of her Majesty’s Principal Secretaries of State :

‘Proprietor’ or ‘Proprietors’ shall mean and include any Person, Company, or Corporation who is the Proprietor of a Salmon Fishery, or who receives or is entitled to receive the Rents of such Fishery on his or their own Account, or as Trustee, Guardian, or Factor for any Person, Company, or Corporation, and shall also include her Majesty in right of her Crown :

‘Byelaw’ and ‘Byelaws’ shall include all Rules, Orders, and Regulations made by the Commissioners under the Authority of this Act :

‘Salmon’ shall mean and include Salmon, Grilse, Sea Trout, Bull Trout, Smolts, Parr, and other migratory Fish of the Salmon Kind :

‘Fisheries’ and ‘Fishery’ shall mean Salmon Fisheries and a Salmon Fishery in any River or Estuary or in the Sea :

‘River’ shall include Tributaries and any Lake from or through which any River flows :

‘Valuation Roll’ shall mean the Valuation Roll in force for the Time for any County, and each of the Royal Burghs therein, made up under the Authority of the



Public General Act Seventeenth and Eighteenth *Victoria*, Chapter Ninety-one, or any other Act relating to the Valuation of Lands and Heritages in *Scotland* which may be in force for the Time.

III. The Enactments and Provisions of this Act with respect to the Appointment, Powers, and Duties of the Commissioners, and the Election, Powers, and Duties of District Boards, shall come into operation and take effect from and after the passing of this Act, and all the other Enactments and Provisions of this Act shall come into operation and take effect from and after the First Day of *January* One thousand eight hundred and sixty-three.

Com-
mencement
of Act.

IV. Each River in *Scotland* flowing into the Sea, and every tributary Stream or Lake flowing into or connected with such River and the Mouth or Estuary of such River, and the Seacoasts adjoining thereto, divided into such Portions as may be fixed and defined by the Commissioners under the Authority of this Act, shall form a District for the Purposes of this Act.

Each River
and Es-
tuary and
the Sea-
coasts ad-
joining, to
be a Dis-
trict. .

V. It shall be lawful for the Secretary of State to appoint Three Commissioners for the Purposes of this Act, who shall be paid at such Rate, not exceeding Three Pounds *per* Day each, as the Commissioners of the Treasury may direct, the whole Amount to be received by each Commissioner not exceeding Three hundred and fifty Pounds *per* *Annum*, over and above such Travelling Expenses as the Commissioners of the Treasury may sanction; Provided that the Duration of the Office of such Commissioners shall in no Case extend beyond Three Years.

Commis-
sioners
to be ap-
pointed by
Secretary
of State.

VI. The Commissioners shall have the Powers and perform the Duties herein-after specified; that is to say,

Duties of
Commis-
sioners. ,

(1.) To fix and define, for the Purposes of this Act and the other Acts relating to Salmon and Salmon Fisheries in *Scotland*, the natural Limits which divide each River in *Scotland* (including the Estuary thereof) from the Sea, in so far as the same may not be already fixed by Statute or by judicial Decision:

(2.) To fix, for the Purposes of this Act, the Limits of the *Solway Firth*, having regard to an Act passed in the Forty-fourth Year of the Reign of his Majesty King *George* the Third, Chapter Forty-five:

(3.) To fix, for the Purposes of this Act, the Limits of every District, and the Portions of the Seacoast adjoining to the Mouth or Estuary of any River to be included in such District:

(4.) To fix, for the Purposes of this Act, a Point on

each River (including the Estuary thereof) below which the Proprietors of Fisheries shall be Lower Proprietors, and above which the Proprietors of Fisheries shall be Upper Proprietors :

(5.) To determine, subject to the Provisions of this Act, at what Dates the Annual Close Time for every District shall commence and terminate, and at what Periods subsequent to the Commencement and prior to the Termination of the Annual Close Time it shall be lawful to fish for and take Salmon with the Rod and Line : Provided that the Number of Days during which such Annual Close Time shall continue shall be the same as regards every District :

(6.) To make general Regulations with respect to the following Matters ; viz.,

The due Observance of the Weekly Close Time :

The Construction and Use of Cruives :

The Construction and Alteration of Mill Dams, or Lades, or Water Wheels, so as to afford a reasonable Means for the Passage of Salmon :

The Meshes of Nets (so that they shall not intercept Smolts or Salmon Fry) :

Obstructions in Rivers or Estuaries to the Passage of Salmon :

Provided that such Regulations shall not interfere with any Rights held at the Time of the passing of this Act under Royal Grant or Charter, or possessed for Time immemorial.

Annual and
Weekly
Close Time.

VII. The Annual Close Time for every District shall continue for One hundred and sixty-eight Days ; and the Weekly Close Time, except for Rod and Line, shall continue from the Hour of Six of the Clock on *Saturday* Night to the Hour of Six of the Clock on *Monday* Morning ; but the Commissioners shall have Power, on the Application of the District Board, or of any Two Proprietors of Fisheries in any District, to vary the Period at which the Weekly Close Time shall commence in any District, or any Part thereof, in so far as they may think reasonable or expedient : Provided that such Weekly Close Time shall in no Case be less than Thirty-six Hours.

Applica-
tion of An-
nual Close
Time.

VIII. The Annual Close Time shall be applicable to every Mode of fishing for or taking Salmon in any River, Lake, or Estuary, or in the Sea, except by means of the Rod and Line, for the Periods in each District to be fixed by the Commissioners subsequent to the Commencement and prior to the Termination of the Annual Close Time

during which it shall be lawful to fish for and take Salmon by means of the Rod and Line.

IX. In regard to any River and Estuary which are regulated by any Local Act relating thereto the Annual Close Time fixed by such Act, and in regard to all other Rivers, Estuaries, and Seacoasts in *Scotland* the Annual Close Time fixed by the Public General Act Ninth *George* the Fourth, Chapter Thirty-nine, shall respectively be applicable until the Annual Close Time with respect to any such River, Estuary, or Seacoast shall be otherwise determined by any Byelaw made by the Commissioners under the Authority of this Act.

Present
Annual
Close
Times to
subsist un-
til altered
under this
Act.

X. It shall not be lawful to fish for or take Salmon at any Place or by any Mode prohibited by any Statute relating to Salmon or Salmon Fisheries in *Scotland* subsisting and in force at the Date of the passing of this Act; and nothing contained in this Act or in any Byelaw made by the Commissioners shall render legal any Mode of fishing which was or would have been illegal at the Date of the passing of this Act.

Fishing
illegal
where pro-
hibited by
existing
Acts.

XI. Every Person who commits any of the following Offences shall for every such Offence be liable to a Penalty not exceeding Five Pounds, and to a further Penalty not exceeding Two Pounds for every Salmon taken or killed contrary to the Provisions of this Act, or of any Byelaw made by the Commissioners under the Authority of this Act; and shall, in addition to such Penalties, at the Discretion of the Magistrate, forfeit every Boat, Net, Rod, Line, or other Article which has been or may be used in fishing for or taking Salmon, and which is found in the Possession of such Person at the Time of the committing such Offence; that is to say,

Penalties
for
Offences.

Every Person who fishes for or takes Salmon during the Annual Close Time by any Means other than the Rod and Line :

Every Person who fishes for or takes Salmon, except during *Saturday* or *Monday*, by Rod and Line, during the Weekly Close Time, or acts in breach or contravention of any Byelaw made by the Commissioners in regard thereto :

Every Person who fishes for or takes Salmon during the Annual Close Time by means of the Rod and Line at a Period not sanctioned by the Commissioners :

Every Person who fishes for Salmon with a Net having a Mesh contrary to any Byelaw of the Commissioners :

Every Person who obstructs or impedes the Passage of Salmon contrary to any Byelaw of the Commissioners :

Every Person who sells or exposes for Sale fresh Salmon

taken within the Limits of this Act during the Period between the Commencement of the latest and the Termination of the earliest Annual Close Time which may have been fixed for any District; but the Burden of proving that Salmon so sold or exposed by any Person for Sale have been caught beyond the Limits of this Act shall lie on the Person selling or exposing the same for Sale :

Every Person who takes or has in his Possession any foul or unseasonable Salmon :

Every Person who uses or has in his Possession any Light for the Purpose and with the Intention of taking Salmon :

Every Person who sets a Net or any other Engine for Capture of Salmon when the Fish show themselves when leaping at or trying to ascend any Fall or other Impediment :

Every Person who wilfully takes or destroys or injures or obstructs the Passage of the Young of Salmon, or disturbs any Spawning Bed, or any Bank or Shallow on which the Spawn of Salmon may be deposited ; but this Provision shall not apply to Acts done for the Purpose of the artificial Propagation of Salmon or for other scientific Purposes, or in the Course of the Exercise of Rights of Property in the Bed of any Stream : Provided also, that the District Board may, with the Consent of all the Proprietors of Salmon Fisheries in any River or Estuary, adopt such Means as they think fit for preventing the Ingress of Salmon into narrow Streams or Tributaries in which they or the Spawning Beds are, from the Nature of the Channel, liable to be destroyed, but always so that no Water Rights used or enjoyed for the Purposes of Manufactures or Agricultural Purposes or Drainage shall be interfered with thereby.

Penalty for
using or
possessing
Salmon
Roe.

XII. Every Person who uses Salmon Roe for the Purpose of fishing, or has in his Possession any Salmon Roe for Sale or for the Purpose of fishing, shall for every such Offence be liable to a Penalty not exceeding Two Pounds, and shall forfeit any Salmon Roe found in his Possession.

Penalty for
causing or
allowing
poisonous
Substances
to flow into
Rivers.

XIII. Every Person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any River containing Salmon, any Liquid or solid Matter poisonous or deleterious to Salmon, or who shall discharge into any River Sawdust to an Extent injurious to any Salmon Fishery, shall be liable to the following Penalties ; (that is to say,)

For the First Offence a Penalty not exceeding Five Pounds :

For the Second Offence a Penalty not exceeding Ten Pounds, and a further Penalty not exceeding Two Pounds for every Day during which such Offence is continued :

For the Third or any subsequent Offence a Penalty not exceeding Twenty Pounds, and a further Penalty not exceeding Five Pounds for every Day during which such Offence is continued :

But no Person shall be subject to the foregoing Penalties for any Act done in the Exercise of any Right to which he is by Law entitled, if he prove to the Satisfaction of the Court before whom he is tried that he has used the best practicable Means, within a reasonable Cost, to dispose of or render harmless the liquid or solid Matter so permitted to flow or to be put into Waters ; but nothing herein contained shall prevent any Person from acquiring a legal Right in Cases where he would have acquired it if this Act had not passed, or exempt any Person from any Punishment to which he would otherwise be subject, or legalize any Act or Default that would but for this Act be contrary to Law.

XIV. The Commissioners shall visit and report on the several Rivers and Estuaries and Salmon Fisheries in *Scotland*, after Notice duly given by special Advertisement in some Newspaper of general Circulation in the District, not less than Ten Days before any such Visitation, to the Proprietors of Salmon Fishings on each of such Rivers or Estuaries, of their Intention so to visit and report.

Commissioners to visit and report on Rivers and Estuaries.

XV. The Commissioners shall, on or before the First Day of *January* One thousand eight hundred and sixty-three, fix and determine by Byelaws the Matters specified in the Third and Fourth Subdivisions of the Sixth Section of this Act ; and a Copy of such Byelaws applicable to each District shall be, prior to the said Date, transmitted by Post to the Sheriff Clerk of each County, in so far as the same may relate to a District or Part of a District situate therein ; and the Sheriff Clerk shall, on Receipt of such Copy, give Notice of such Byelaws by Advertisement inserted once for each of Two successive Weeks in some Newspaper published in such County, or, if no Newspaper be published therein, in some Newspaper published in a County adjoining thereto ; and every Person whose Interests may be affected by any such Byelaws may state to the Secretary of State any Objections to any such Byelaw ; and the Secretary of State shall, after One Month after the Date of such Byelaws, approve or alter or disapprove of the same ; and every such Byelaw, when approved of or altered by the Secretary of State, shall be published in the *Edin-*

Commissioners to make Byelaws on Matters specified in Third and Fourth Subdivisions of Sixth Section of this Act.

burgh Gazette, and in such further Mode as the Secretary of State may direct, and on being so published shall be legal and binding on all concerned: Provided that in the Case of such Districts in which by reason of their inconsiderable Size it may seem to the Commissioners unnecessary to determine such Matters, they may defer doing so until required by more than Six Proprietors of Fisheries within the same, after the Limits of such District have been defined, as hereinafter provided, and shall proceed, in other respects, as above provided.

Commissioners to make Byelaws on the other Matters specified in Sixth Section.

XVI. The Commissioners shall, on or before the First Day of *January* One thousand eight hundred and sixty-four, determine the other Matters specified in the Sixth Section of this Act, by Byelaws under their Hands, or the Hand of any Two of them, and shall report the same to the Secretary of State; provided that previously to making such Byelaws they shall communicate the same to the District Board, and afford the Board reasonable Opportunity of making any Representation to the Commissioners respecting the same; and a Copy of such Byelaws shall be transmitted to the Sheriff Clerk of each County, in so far as the same may relate to any District situated therein; and the Sheriff Clerk shall, on the Receipt of such Copy, give Notice of such Byelaws by Advertisement inserted once for each of Two Successive Weeks in some Newspaper published in such County, or if no Newspaper be published therein, in some Newspaper published in a County adjoining thereto; and every Person whose Interests may be affected by any such Byelaws may state to the Secretary of State any Objections to any such Byelaw; and the Secretary of State shall, after Two Months and within Four Months after the Date of such Byelaws, approve or alter or disapprove of the same; and every such Byelaw, when approved of or altered by the Secretary of State, shall be published in the *Edinburgh Gazette*, and in such further Mode as the Secretary of State may direct, and on being so published shall be legal and binding on all concerned.

As to Evidence to be taken by Commissioners.

XVII. The Commissioners, in execution of this Act, shall take such Evidence as they may find to be necessary, and in the event of Witnesses refusing to attend and give Evidence, or to allow Access to Documents, they may apply to the Sheriff of the County for a Warrant to cite Witnesses and Havers, and the Sheriff is hereby authorized to grant the same.

As to the Election of District Boards.

XVIII. Within Three Months after any Byelaw constituting the District shall have been published, the Sheriff shall direct the Sheriff Clerk to make up a Roll of the Upper Proprietors, and also a Roll of the Lower Proprietors

in each District; and the Qualification of an Upper Proprietor shall be the Property of a Fishery entered in the Valuation Roll as of the yearly Rent or yearly Value of Twenty Pounds or upwards, or, if such Fishery be not valued on the Valuation Roll, of Half a Mile of Frontage to the River, with a Right of Salmon Fishing, and the Qualification of a Lower Proprietor shall be the Property of a Fishery entered in the Valuation Roll as of the yearly Rent or yearly Value of Twenty Pounds or upwards; and the Sheriff shall have Power to decide summarily any Question arising on any Claim to such Qualification; and the Sheriff shall thereafter direct the Sheriff Clerk to call a Meeting of the Upper Proprietors, and also a Meeting of the Lower Proprietors, at such Times and Places as he shall direct; and Notice of such Meeting shall be given as herein-before provided with respect to the Publication of Byelaws made by the Commissioners; and the Upper Proprietors and Lower Proprietors present at such separate Meetings respectively shall elect not more than Three of their Number to be Members of the District Board, every Proprietor of a Fishery valued at more than Five hundred Pounds on the Valuation Roll having Two Votes at such Election, and an additional Vote for every Five hundred Pounds of Rental, but not more than Four Votes in all; and the Members so elected with the Proprietor having the largest Amount entered in the Valuation Roll as the yearly Rent or yearly Value of Fisheries in such District shall constitute the District Board; and the last-mentioned Proprietor shall be the Chairman of the Board, and have a deliberative as well as a casting Vote; and the Election of such Board shall be notified by the Chairman of such respective Meetings to the Sheriff Clerk within Seven Days from the Date of the same, and the Sheriff shall thereafter summon the First Meeting of such Board for such Day and such Place as he may fix: Provided always, that if any River be situate in Two or more Counties, the Notices above provided shall be given and such Meetings shall be called in such Manner as the Sheriffs of such Counties jointly shall direct.

XIX. If in any District the Upper Proprietors or the Lower Proprietors shall be fewer in Number than Three, the Board shall consist of an equal Number, elected as aforesaid, along with the Proprietor having the largest Valuation, who shall also be Chairman of the Board, as above provided; and if such last-mentioned Proprietor be the sole Upper or the sole Lower Proprietor, he shall have Two Votes on the Board; and if there shall be only One Proprietor in any District, such Proprietor shall have and

Constitu-
tion of the
Board
where Pro-
prietors are
less in
Number
than Three.

Their
Votes.

may exercise all the Powers by this Act conferred on the District Board.

Mandato-
ries may be
appointed.

XX. It shall be lawful for the Commissioners of her Majesty's Woods, Forests, and Land Revenues, or either of them, in Cases where her Majesty in right of her Crown is Proprietor of any Fishery, and for any Corporation or Company, being the Proprietors of any Fishery, or for any Proprietor of a Fishery, respectively, from Time to Time to nominate and appoint, by any Writing under his or their Hand or Seal, any Person as the Mandatory of such Commissioners, Corporation, Company, or Proprietor to attend, act, and vote at any Meeting of Proprietors under this Act; and every such Nomination and Appointment shall subsist until recalled by the said Commissioners or either of them, or by the Corporation or Company or Proprietor making the same.

Payment
to Sheriff
Clerk in
connection
with Elec-
tions.

XXI. All Expenses incurred by the Sheriff Clerk in making up the Roll of Proprietors, and in calling and attending the Meetings for the Election of the District Board, with such reasonable Remuneration for his Time and Trouble as shall be fixed by the Sheriff, shall be paid to the Sheriff Clerk by the District Board out of the Assessments to be levied under the Authority of this Act.

Powers
and Duties
of District
Boards.

XXII. The District Board may sue or be sued in the Name of their Clerk, and if there be more than Six Members Three Members shall form a Quorum, and if there be fewer than Six Members Two shall form a Quorum, and they shall keep regular Books and Accounts, and shall hold their First Meeting within Ten Days after the First Election under this Act at a Time and Place to be fixed at the Meetings of Proprietors at which such Election took place, or in Cases where such Election is not necessary the First Meeting shall take place at a Time to be fixed by a Majority of the Proprietors, and Notice of such Meeting shall be given as herein-before provided with respect to the Publication of Byelaws to be made by the Commissioners; and the District Board shall have Power, subject to the Provisions of this Act and the Byelaws made by the Commissioners, to make and alter from Time to Time Regulations for the Preservation of the Fisheries in the District, and from Time to Time to appoint a Clerk, and such Number of Constables, Water Bailiffs, Watchers, and other Officers as they think fit, to fix and prescribe the Duties of all Persons appointed by them, and to remove such Persons, and appoint other Persons in their Stead; and they may combine with any other District Board for the Purpose of this Act, and to maintain a common Staff of Officers for the Protection and Preservation of the Fisheries of

more than One District, and may agree with the Police Committee of any County for the Purpose of paying additional Constables for the better Protection of the Fisheries in their District: Provided that all such Regulations shall, before taking effect, be reported to and approved by the Secretary of State, and shall not interfere with any vested Right of Property, and shall not authorize any Encroachment or Trespass on private Property.

XXIII. The District Board shall have Power to impose an Assessment for the Purposes of this Act, to be called the Fishery Assessment, on the several Fisheries in each District, according to the yearly Rent or yearly Value of such Fisheries as entered in the Valuation Roll; and every Proprietor of a Fishery which is not valued on the Valuation Roll, and who shall claim Right to vote in the Election of Members of the District Board, shall be held to be a Proprietor of a Fishery of the Value of Twenty Pounds, and shall be assessed accordingly; and such Fishery Assessments may be imposed, collected, and recovered by the District Board in the same Manner as Police Assessments may be imposed, collected, and recovered by the Commissioners of Supply under the Authority of the Public General Act, Twentieth and Twenty-first *Victoria*, Chapter Seventy-two; and for the Purpose of imposing, collecting, and recovering such Fishery Assessments the District Boards shall have and may exercise all the Powers conferred by the said Act on Commissioners of Supply for imposing, collecting, and recovering the Assessments leviable under the same.

Assess-
ments may
be imposed
by District
Boards.

XXIV. Each District Board shall continue in Office for Three Years, and Members thereof shall be eligible for Re-election, and Vacancies occurring during such Period shall be filled up by the Board until the next Meeting of Proprietors, who shall then fill up the same; and Meetings of the Upper and Lower Proprietors respectively for the Purpose of each triennial Election of not more than Three Upper Proprietors and Three Lower Proprietors respectively shall be called by the Clerk, who shall give Notice of such Meetings by Advertisement as herein-before provided with respect to the Publication of Byelaws made by the Commissioners; and such Meetings shall at the same Time take such Steps as they shall think proper for auditing and attesting the Accounts of the District Board for the preceding Three Years.

As to future
Elections
of District
Boards.

XXV. It shall be lawful for the District Board, by any Byelaw or Regulation to be made by them and approved of by the Secretary of State as herein-before provided, to enact that any Person committing any Breach or Contra-

Penalties
for Breach
of Byelaws
and Regu-
lations.

vention of such Byelaw or Regulation shall be liable for every such Offence to a Penalty not exceeding Two Pounds; and such Penalty may be sued for and recovered in the same Manner as Penalties incurred and imposed under the Provisions of this Act.

Forfeited
Articles
may be
seized.

XXVI. Any Net, Rod, Line, or other Article directed to be forfeited under this Act may be seized by any Constable, Water Bailiff, Watcher, or other Officer appointed by the District Board, and the Sheriff or Justice may either order the same to be destroyed or to be sold, and the Proceeds of such Sale to be paid to the Clerk on behalf of the District Board.

Three or
more Per-
sons ille-
gally fish-
ing at
Night to be
guilty of a
Criminal
Offence.

XXVII. If Three or more Persons acting in concert, or being together or in company, shall at any Time between the Expiration of the First Hour after Sunset on any Day and the Beginning of the last Hour before Sunrise on the following Morning enter or be found upon any Ground adjacent or near to any River or Estuary or the Sea, or in or upon any River or Estuary or the Sea, with Intent illegally to take or kill Salmon, or having in his or their Possession any Net, Rod, Spear, Light, or other Instrument used for taking Salmon with such Intent as aforesaid, or shall illegally take or kill, or attempt to take or kill, or aid or assist in killing or taking Salmon, every such Person shall be guilty in *Scotland* of a Criminal Offence, and in *England* within the Limits of the ' *Tweed Fisheries Amendment Act* ' of a Misdemeanor, and shall for every such Offence be liable to a Fine not exceeding Five Pounds, or to Imprisonment for any Period not exceeding Three Months, as the Sheriff or Justices before whom such Persons or any of them are tried and convicted may determine; and if such Fine be not paid immediately on conviction, the Offender so failing to pay shall be sentenced to Imprisonment for such Period, not exceeding Three Months, as the Sheriff or Justices may adjudge, unless such Fine shall be sooner paid.

Prosecu-
tion for
Offences
under this
Act, and
Recovery
of Penal-
ties.

XXVIII. All Offences under this Act may be prosecuted and all Penalties incurred under this Act may be recovered before any Sheriff or any Two Justices acting together and having Jurisdiction in the Place where the Offence was committed, at the Instance of the Clerk of any District Board or of any other Person; and it shall be lawful for the Sheriff or Justices to whom any Petition or Complaint is presented to proceed in a summary Form, and to grant Warrant for bringing the Persons complained against before him or them, and on Proof on Oath by One or more credible Witness or Witnesses, or Confession of the Person accused, or other legal Evidence, forthwith to

determine and give Judgment in such Complaint without any written Pleadings or Record of Evidence, other than a Record of the Charge and of the Judgment pronounced thereon, and to grant Warrant for the Recovery of all Penalties and Expenses decerned for, by Poinding, and Imprisonment for any Period not exceeding Six Months; and any Person who shall think himself aggrieved by any Judgment of the Sheriff or Justices pronounced in any Complaint or Prosecution under this Act may appeal to the Court of Justiciary at their next Circuit Court, or where there is no Circuit Court to the High Court of Justiciary at *Edinburgh*, in the Manner and under the Rules, Limitations, Conditions, and Restrictions contained in the Act passed in the Twentieth Year of the Reign of his Majesty King *George* the Second, Chapter Forty-three, for taking away and abolishing Heritable Jurisdictions in *Scotland*, with this Variation, that such Person shall, in place of finding Caution in the Terms prescribed by the said Act, be bound to find Caution to pay the Penalty and Expenses awarded against him by the Judgment appealed from, in the event of such Appeal being dismissed, together with any additional Expenses that shall be awarded by the Circuit Court or Court of Justiciary on dismissing such Appeal; and it shall not be competent to appeal from or bring the Judgments of any Sheriff or Justices acting under this Act under Review by Advocation or in any other Way than as herein provided.

XXIX. In the event of any Person refusing or neglecting to obey any Byelaw made by the Commissioners, or any Regulation made by the District Board, the Clerk may apply to the Sheriff by summary Petition in ordinary Form, praying to have such Person ordained to obey the same, and the Sheriff shall take such Proceedings and make such Orders thereupon as he shall think just.

Enforcement of Regulations and Byelaws.

XXX. In giving Judgment on any Application or Complaint under this Act, the Sheriff or Justices may find the Person complained against liable in Expenses, and may decern for Payment of the same.

Expenses may be decerned for.

XXXI. All Penalties and Expenses incurred under this Act, or under any Byelaw or Regulation made under the Authority thereof, may be recovered by ordinary Action or in the Small Debt Court of the Sheriff.

Recovery of Penalties and Expenses.

XXXII. The Penalties incurred under this Act shall in all Prosecutions at the Instance of the Clerk of any District Board be payable to and recoverable by such Clerk, and shall in all other Cases be paid and applied in such Manner as the Sheriff or Justices may direct; and all Penalties and Expenses received by the Clerk, and the

Payment and Application of Penalties.

Proceeds of the Sale of any Articles seized and directed to be sold as before provided, shall be applied by the District Board towards defraying the Expenses incurred by them in carrying into execution the Provisions of this Act.

Certain Provisions of Act 24 & 25 Vict. c. 109, applied to Solway Firth.

XXXIII. From and after the First Day of *January* One thousand eight hundred and sixty-five the Provisions of the said Act, intituled *An Act to amend the Laws relating to Fisheries of Salmon in England*, shall extend and apply to Salmon Fisheries in the Waters and on the Shores of the *Solway Firth* situate in *Scotland*, as the same may be fixed by Authority of this Act, and to the Rivers flowing into the same, in so far as such Provisions relate to the Use of fixed Engines for the taking of Salmon: Provided that all Offences against such Provisions shall be prosecuted and punished as directed by this Act.

This Act not to apply to the River Tweed.

XXXIV. No Part of this Act, with the Exception of the Tenth, Twelfth, and Twenty-seventh Clauses, shall apply to the River *Tweed*, or to any Fisheries in the said River or the Mouth or Entrance thereof, as defined by 'The *Tweed Fisheries Amendment Act*, 1859;' and any Penalties incurred under the said Tenth, Twelfth, and Twenty-seventh Clauses of this Act shall, so far as concerns the River *Tweed*, be recoverable in manner prescribed by the *Tweed Fisheries Amendment Act*, 1857, which Act, and the *Tweed Fisheries Amendment Act*, 1859, shall remain in full Force and Effect, anything herein contained to the contrary notwithstanding.

CAP. CXIII.

An Act to amend the Law relating to the Removal of poor Persons from England to Scotland, and from Scotland to England and Ireland.—[7th August 1862.]

'WHEREAS it is expedient that better Means should be provided for the safe Conveyance to the Place of their Destination in *England, Ireland, or Scotland* of poor Persons who may be removed in pursuance of the Acts passed in the Eighth and Ninth Years of the Reign of her present Majesty, Chapter Eighty-three, and Chapter One hundred and seventeen, and in the Tenth and Eleventh Years of the Reign of her present Majesty, Chapter Thirty-three: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this

present Parliament assembled, and by the Authority of the same :

I. No Application for a Warrant ordering the Removal from any Place in *England* to *Scotland*, or in *Scotland* to *England* or *Ireland*, of any poor Person who shall have become chargeable in such Place shall be heard and determined in *England*, except by Two or more Justices in Petty Sessions assembled, or by a stipendiary Magistrate or Metropolitan Police Magistrate sitting in his Court; and in *Scotland*, except by the Sheriff or any Two Justices of the Peace of the County in which the Parish is situated to which such poor Person may have become chargeable, which Justices or Magistrate, and Sheriff or Justices (as the Case may be) shall see such poor Person, or the Person who is the Head of the Family proposed to be removed, and shall be satisfied that every Person who is proposed to be removed by the Warrant is in such a State of Health as not to be liable to suffer bodily or mental Injury by the Removal.

Warrant of Removal to Scotland to be signed by Two Justices or a Magistrate, and to England or Ireland by the Sheriff or Two Justices.

II. Such Warrant of Removal shall be granted in *England* only on the Application of the Relieving Officer, or other Officer of the Guardians of the Union or Parish, and in *Scotland* only on the Application of the Inspector of the Poor of the Parish or Combination, or other Officer appointed by the Parochial Board of such Parish or Combination, where such poor Person shall have become chargeable, and shall contain the Name and reputed Age of every Person ordered to be removed by virtue of the same, and the Name of the Place in *Scotland* or *England* or *Ireland* (as the Case may be) where the Justices or Magistrate, or Sheriff or Justices, shall find such Person to have been born, or to have last resided for the Space of Five Years in the Case of a poor Person to be removed to *Scotland*, and Three Years in the Case of a poor Person to be removed to *England* or *Ireland*, and a Statement of such Examination having been made as to the State of Health of every Person ordered to be removed as aforesaid; and such Warrant shall be addressed to the Party applying for the same, and in the Case of a Removal to *Scotland*, to the Parochial Board or Inspector of the Poor of the Parish or Combination to which such poor Person is to be removed, and in the Case of a Removal to *England* or *Ireland* (as the Case may be), to the Guardians of the Union or Parish to which such Person is to be removed, and a Copy shall be given by and at the Cost of the Person applying for such Warrant to the Person or the Head of the Family about to be removed by virtue of it: Provided that in the

Warrant to contain Name and Age of every Person to be removed, and other Particulars.

Proviso.

Case of any Native of *England, Ireland, or Scotland*, where the Justices or Magistrate, or Sheriff or Justices (as the Case may be), shall not be able to ascertain, upon the Evidence before them, the Place of Birth or of such continued Residence as aforesaid, they shall order the Pauper to be removed to the Port, or Union, or Parish in *England or Ireland* (as the Case may be), or Port or Parish in *Scotland*, which shall in the Judgment of such Justices or Magistrate, or Sheriff or Justices (as the Case may be), under the Circumstances of the Case be most expedient.

Copy of Warrant to be sent to Parish to which Removal is to be made.

III. The Person obtaining the Warrant shall, at least Twelve Hours before the Removal, send a Copy of it by Post to the Inspector of the Poor of the Parish or Combination in *Scotland*, and to the Clerk of the Board of Guardians of the Union or Parish in *England or Ireland* (as the Case may be), to which such poor Person shall be ordered to be removed, and also a Copy of the Depositions taken in the Case, if the same shall, at any Time within Three Months from the Date of the Warrant, be required by any such Board of Guardians or Parochial Board.

Warrants shall order poor Persons to be conveyed to the Place mentioned in the Warrant.

IV. Such Warrant shall order the Removal of the poor Person to be made to the Place mentioned therein as aforesaid, and shall order the Persons charged with the Execution thereof to cause such poor Person, with his Family (if any), to be safely conveyed to such Place in *England, Ireland, or Scotland* (as the Case may be), to be delivered, in the Case of a Removal to *Scotland*, to the Inspector of the Poor of the Parish or Combination, and in the Case of a Removal to *England or Ireland*, at the Workhouse of such Place, or of the Union or Parish containing the Port or Place nearest to the Place mentioned in the Warrant as the Place of the Pauper's ultimate Destination.

Relieving Officers and Inspectors of Poor to receive poor Persons named in Warrant under Penalty of 10*l*.

V. The Master of the Workhouse of the Union or Parish in *England or Ireland*, and the Inspector of the Poor of the Parish or Combination in *Scotland*, to which (as the Case may be) such Warrant is addressed, shall be bound to receive Delivery of the poor Person named in such Warrant, under a Penalty of Ten Pounds for each Case of Refusal, which Penalty may be recovered by the Person applying for such Warrant by an Action in any County Court in *England*, or Court of Quarter Sessions in *Ireland*, or Sheriff Court in *Scotland*, or other competent Court having Jurisdiction in the Place where such Master or Inspector is resident at the Time when such Action is brought.

Parochial Boards and Guardians may

VI. If by reason of Default of the Guardians, Inspector of the Poor, or other Person having charge of such Warrant, or otherwise, the poor Person named therein shall not

be removed to the Place of ultimate Destination, the Guardians of the Union or Parish in *England* or *Ireland*, or Parochial Board of the Parish or Combination in *Scotland* (as the Case may be), to which he has been removed, may, if they think fit, cause the Pauper to be removed forthwith to the Place mentioned in the Warrant, and shall be entitled to be reimbursed the Costs incurred in such Removal by the Guardians or Parochial Board (as the Case may be), or other Person on whose Application the Warrant was obtained, such Costs being the actual Expense incurred in and about the Conveyance and Maintenance of each Person so removed, which Costs may, if not paid on Demand, be recovered by an Action in any County Court in *England* or *Ireland*, or Sheriff Court in *Scotland*, or other competent Court having Jurisdiction in the Place from whence the Removal shall have taken place.

forward the Pauper to the Place of Destination and recover the Costs.

VII. It shall be unlawful to remove any Woman, or any Child under the Age of Fourteen, as a Deck Passenger in any Vessel from *England* to *Scotland*, or from *Scotland* to *England* or *Ireland*, during the Period from the First of *October* to the Thirty-first of *March* following; and no Regulation of any Sheriff, Magistrate, or Justices authorizing such Removal shall be henceforth legal.

Persons not to be removed as Deck Passengers during the Winter.

VIII. Section Seventy-seven of the Act Eighth and Ninth *Victoria*, Chapter Eighty-three, in so far as inconsistent with the Provisions of this Act, is hereby repealed.

Part of 8 & 9 Vict. c. 88, repealed.

IX. Except so far as this Act shall alter the Provisions of the said Acts, this Act shall be construed as Part of the same.

Construction of this Act.

CAP. CXIV.

An Act for the Prevention of Poaching.—[7th August 1862.]

‘WHEREAS it is expedient that the Laws now in force for the better Detection and Prevention of Poaching should be amended:’ Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. The word ‘Game’ in this Act shall for all the Purposes of this Act be deemed to include any One or more Hares, Pheasants, Partridges, Eggs of Pheasants and Par-

Interpretation of Terms.

tridges, Woodcocks, Snipes, Rabbits, Grouse, Black or Moor Game, and Eggs of Grouse, Black or Moor Game; and the Words 'Justice' and 'Justices' in this Act shall, unless otherwise provided for, mean respectively a Justice and Justices of the Peace respectively of or for the County, Riding, Division, Liberty, City, Borough, or Place in which any Game, Gun, Part of Gun, Net, Snare, or Engine after mentioned shall be found.

Power to
Constables
to search
Persons
without
Warrant
in certain
Cases.

II. It shall be lawful for any Constable or Peace Officer in any County, Borough, or Place in *Great Britain* and *Ireland* in any Highway, Street, or Public Place, to search any Person whom he may have good Cause to suspect of coming from any Land where he shall have been unlawfully in search or pursuit of Game, or any Person aiding or abetting such Person, and having in his Possession any Game unlawfully obtained, or any Gun, Part of Gun, or Nets, or Engines used for the killing or taking Game, and also to stop and search any Cart or other Conveyance in or upon which such Constable or Peace Officer shall have good Cause to suspect that any such Game or any such Article or Thing is being carried by any such Person, and should there be found any Game or any such Article or Thing as aforesaid upon such Person, Cart or other Conveyance, to seize and detain such Game, Article, or Thing; and such Constable or Peace Officer shall in such Case apply to some Justice of the Peace for a Summons citing such Person to appear before Two Justices of the Peace assembled in Petty Sessions, as provided in the Eighteenth and Nineteenth of her present Majesty, Chapter One hundred and twenty-six, Section Nine, as far as regards *England* and *Ireland*, and before a Sheriff or any Two Justices of the Peace in *Scotland*; and if such Person shall have obtained such Game by unlawfully going on any Land in search or pursuit of Game, or shall have used any such Article or Thing as aforesaid for unlawfully killing or taking Game, or shall have been accessory thereto, such Person shall, on being convicted thereof, forfeit and pay any Sum not exceeding Five Pounds, and shall forfeit such Game, Guns, Parts of Guns, Nets, and Engines, and the Justices shall direct the same to be sold or destroyed, and the Proceeds of such Sale, with the Amount of the Penalty, to be paid to the Treasurer of the County or Borough where the Conviction takes place; and no Person who, by Direction of a Justice in Writing, shall sell any Game so seized shall be liable to any Penalty for such Sale; and if no Conviction takes place, the Game or any such Article or Thing as aforesaid, or the Value thereof, shall be restored to the Person from whom it had been seized.

III. Any Penalty under this Act shall be recovered and enforced in *England* in the same Manner as Penalties under the Act First and Second *William* the Fourth, Chapter Thirty-two, and in *Scotland* under the Act Second and Third *William* the Fourth, Chapter Sixty-eight, and in *Ireland* under the Petty Sessions, *Ireland*, Act, 1851, when not otherwise directed in this Act.

Recovery
of Penal-
ties.

IV. The Powers and Provisions of the Act of the Eleventh and Twelfth Years of her present Majesty, Chapter Forty-three, shall extend and apply to this Act, and to all Proceedings, Matters, and Things to be taken, had, and done, and to all Persons to be proceeded against or taking Proceedings under this Act.

Provisions
of 11 & 12
Vlct. c. 43,
extended
to this Act.

V. No Conviction or Order made under this Act, or Adjudication made on Appeal therefrom, shall be quashed for want of Form, or be removed by Certiorari or otherwise into any of her Majesty's Superior Courts of Record; and no Warrant of Commitment shall be held void by reason of any Defect therein, provided it be therein alleged that the Party has been convicted, and there be a good and valid Conviction to sustain the same.

No Convic-
tion shall
be quashed
for Want
of Form
or removed
by Certio-
rari.

VI. Any Person who shall think himself aggrieved by any such summary Conviction may appeal to the next Court of General or Quarter Sessions which shall be holden not less than Twelve Days after the Day of such Conviction for the County, Riding, Division, or Borough wherein the Cause of Complaint shall have arisen, provided that such Person shall give to the Complainant a Notice in Writing of such Appeal, and of the Cause and Matter thereof, within Three Days after such Conviction, and Seven clear Days at the least before such Sessions, and shall, within Three Days, enter into a Recognizance, or Bond of Caution in *Scotland*, with a sufficient Surety, before a Justice of the Peace, conditioned personally to appear at the said Sessions, and to try such Appeal, and to abide the Judgment of the Court thereupon, and to pay such Costs as shall be awarded by the Court; and the Court at such Sessions shall hear and determine the Matter of Appeal, and shall make such Order therein, with or without Costs, to either Party, as to the Court shall seem fit, and shall, if necessary, issue Process for enforcing such Judgment.

Power of
Appeal.

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